82-1293

NO.....

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JEREMIAH TEMPLE, ET AL.,

Appellants,

v.

ALABAMA PUBLIC SERVICE COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA

JURISDICTIONAL STATEMENT

ROBERT J. VARLEY

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Attorney for Appellants

February 1983

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QUESTION PRESENTED

Certain provisions of the Alabama Code (*see* Appendix E, *infra*) require the posting of a bond on appeal from utility rate cases where the appellant desires to stay or supersede the Commission's order below. The required bond must be in an amount *double* that by which the affected utility estimates its revenues will be increased or decreased, as the case may be, if the stay or supersedeas is allowed. The Alabama Supreme Court has interpreted these statutes to *require* the posting of such a bond in every utility rate case as a precondition to restitution should the appealing party prevail on the merits of the appeal.

The ultimate question presented is whether the Alabama statutes governing appeals in utility rate cases violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States, insofar as they have been applied to require the posting of a double bond as a precondition to an order awarding restitution should the appealing party prevail on the merits of the appeal.*

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*Other appellants below and appellants in this Court are Napolean and Rosa Lee Turner, Luvenia Harris, James B. Thrasher, Emma Richardson, Alice Elmore, Hal Patterson, Jessie Murray, R. C. Gary and Lillian Bilbro.

Other appellees below were the Alabama Power Company, the State of Alabama, the Alabama League of Aging Citizens, Inc., R. S. Crowder, and Airco, Inc., Alabama Metallurgical Corporation, Ciba-Geigy Corporation, Courtalds North America, Inc., Diamond Shamrock Corporation, Ideal Basic Industries, Inc., Kimberly-Clark Corporation, Monsanto Company, Ohio Ferro-Alloys, Olin Corporation, Stauffer Chemical Company, Union Carbide Corporation and Uniroyal, Inc. (collectively known and appearing as the "Alabama Industrial Group"). Of these, only the Alabama Power Company actively participated in the appeal below, and appellants have notified the Clerk pursuant to Rule 10.4 of their belief that the other parties named above have no interest in the outcome of this appeal.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
THE FEDERAL QUESTION IS SUBSTANTIAL	7
A. The Challenged Statutes, As Applied, Are Repugnant To The Equal Protection Clause Of The Fourteenth Amendment	8
B. The Challenged Statutes, As Applied, Are Repugnant To The Due Process Clause Of The Fourteenth Amendment	16
C. There Is A Conflict Of Authority Among The States Which Deserves Resolution By This Court	20
CONCLUSION	23
APPENDIX A—Order Of The Supreme Court Of Alabama Dismissing Appeal	1a

TABLE OF CONTENTS (Cont'd)

Page

APPENDIX B—Order of the Supreme Court Of Alabama Denying Application for Rehearing 3a

APPENDIX C—Notice of Appeal to the Supreme Court of the United States 5a

APPENDIX D—Appellants' Application for Rehearing 8a

APPENDIX E—Alabama Statutory Provisions Involved 13a

APPENDIX F—Notice to State Attorney General that Constitutionality of State Statutes is Drawn Into Question 21a

APPENDIX G—Certificate of Service 23a

TABLE OF AUTHORITIES

CASES:

Arizona Grocery Co. v. Atchinson Topeka & Santa Fe Railway Co., 284 U.S. 370 (1932) 21

Arkadelphia Milling Co. v. St. Louis Southwestern Railway, 249 U.S. 134 (1919) 20

TABLE OF CONTENTS (Cont'd)

Page

Armstrong v. Manzo,
380 U.S. 545 (1965) 17

Atlantic Coastline Railroad Co. v. Florida,
295 U.S. 301 (1935) 11, 20

Baltimore & Ohio Railroad v. United States,
279 U.S. 781 (1929) 20

Bebchick v. Public Utilities Commission,
318 F.2d 187 (D.C. Cir.), *cert. denied*,
373 U.S. 913 (1963) 11

Board of Regents v. Roth,
408 U.S. 564 (1972) 19

Boddie v. Connecticut,
401 U.S. 371 (1971) 14, 16, 17, 18

Committee of Consumer Services v. Pacific Service Commission of Utah,
638 P.2d 533 (Utah 1981) 22

Dixon v. Davis,
521 S.W.2d 442 (Mo. 1975) 12

Georgia Power Project v. Georgia Power Co.,
409 F.Supp. 332 (N.D. Ga. 1975) 19

Grant v. City of Mobile,
50 Ala. App. 654, 282 So.2d 285 (1973) 8

Hartwell v. State,
225 Ala. 206, 142 So. 678 (1932) 14

TABLE OF CONTENTS (Cont'd)

Page

In re Granite State Electric Co.,
421 A.2d 121 (N.H. 1980) 22

Keco Industries, Inc. v. Cincinnati & Suburban Bell Telephone Co.,
166 Ohio St. 254, 141 N.E.2d 465,
cert. denied, 355 U.S. 182 (1957) 21

Lane v. Brown,
372 U.S. 477 (1963) 8

Lassitter v. Lee,
68 Ala. 287 (1880) 14

Lecates v. Justice of Peace Court No. 4,
637 F.2d 898 (3rd Cir. 1980) 17, 18

Lindsey v. Normet,
405 U.S. 56 (1972) 8, 13

Mandel Brothers, Inc. v. Chicago Tunnel Terminal Co.,
2 Ill.2d 205, 117 N.E.2d 774 (1954) 21

McKane v. Durston,
153 U.S. 684 (1894) 8

Memphis Light, Gas & Water Division v. Craft,
436 U.S. 1 (1978) 7, 18

Modrok v. Marshall,
523 P.2d 172 (Alaska 1974) 14

Morissey v. Brewer,
408 U.S. 471 (1972) 19

TABLE OF CONTENTS (Cont'd)

Page

Mountain States Telephone & Telegraph Co. v. Public Utilities Commission, 502 P.2d 945 (Colo. 1972) 22

Mountain States Telephone & Telegraph Co. v. Arizona Corporate Commission, 124 Ariz. 433, 604 P.2d 1144 (Ariz. App. 1979) 22

Mullane v. Central Hanover Bank, 339 U.S. 306 (1950) 17

Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856) 19

Northwestern Bell Telephone Co. v. State, 216 N.W.2d 841 (Minn. 1974) 22

O'Day v. George Arakelian Farms, Inc., 536 F.2d 856 (9th Cir. 1976) 14

Ownbey v. Morgan, 256 U.S. 94 (1921) 19

Postal Telegraph-Cable Co. v. City of Montgomery, 193 Ala. 234, 69 So. 428 (1915) 8

Powell v. Alabama, 287 U.S. 45 (1932) 19

Rice v. Lucas, 560 S.W.2d 850 (Mo. 1978) 15

TABLE OF CONTENTS (Cont'd)

Page

Royster Guano Co. v. Virginia,
253 U.S. 412 (1920) 12

Saharoff v. Stone,
638 F.2d 90 (9th Cir. 1980) 13

Securities & Exchange Commission v. Chenery Corp.,
332 U.S. 194 (1947) 11

Sellers v. Iowa Power & Light Co.,
372 F.Supp. 1169 (S.D. Iowa 1974) 19

Smith v. Bennett,
365 U.S. 708 (1961) 8

Southern Pacific Co. v. Interstate Commerce Commission,
219 U.S. 433 (1911) 7

Stoudenmire v. Brown,
48 Ala. 699 (1872) 14

Tumey v. Ohio,
273 U.S. 510 (1927) 19

United Gas Improvement Co. v. Calley Properties, Inc.,
382 U.S. 223 (1965) 11

United States Gas Pipe Line Co. v. Mobile Gas Service Corp.,
350 U.S. 332 (1956) 10, 20

Usher v. Waters Insurance & Realty Co.,
438 F.Supp. 1215 (W.D. N.C. 1977) 14, 15

TABLE OF CONTENTS (Cont'd)

Page

Whitworth v. Anderson, 54 Ala. 33 (1875) 14

Williams v. Washington Metropolitan Area Transit Commission, 415 F.2d 922 (D.C. Cir. 1968), *cert. denied* 393 U.S. 1081 (1969) 11

Willis v. Buchman, 240 Ala. 386, 199 So. 892 (1940) 8

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS:

United States Constitution, Fourteenth Amendment, § 1 ..... Passim

Constitution of Alabama (1901) Art. 1, §13 20

Code of Alabama (1975) §37-1-80 19

Code of Alabama (1975) §37-1-81 9

Code of Alabama (1975) §37-1-125 ..... 3, 15

Code of Alabama (1975) §37-1-126 ..... 3, 15

Code of Alabama (1975) §37-1-127 ..... 3, 9, 13, 15

Code of Alabama (1975) §37-1-128 ..... 3, 9, 13, 15

Code of Alabama (1975) §37-1-129 ..... 3, 6, 15

Code of Alabama (1975) §37-1-130 ..... 3, 15

Code of Alabama (1975) §37-1-140 ..... 3, 4, 8, 16

Code of Alabama (1975) §37-1-141 ..... 3, 9,15

TABLE OF CONTENTS (Cont'd)

Page

Code of Alabama (1975) §37-1-143 4

Code of Colorado (1973) §40-6-116 22

Rule 8 of the Alabama Rules of Appellate Procedure 3, 15

MISCELLANEOUS:

Restatement of Restitution §74 (1937) 10

Levin, *Illinois Public Utility Law and the Consumer: A Proposal to Redress the Imbalance*, 26 De Paul L. Rev. 259 (1977) 21

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JURISDICTIONAL STATEMENT

This appeal is taken from the final order and judgment of the Supreme Court of Alabama entered on November 5, 1982, overruling appellants' application for rehearing, and from its order and judgment entered on October 21, 1981, dismissing their appeal. Appellants submit this statement in support of the jurisdiction of the Supreme Court of the United States to hear this appeal and to show that a substantial federal question is presented.

OPINIONS BELOW

The October 21, 1981, order and opinion of the Alabama Supreme Court dismissing appellants' appeal below is not as yet reported and appears as Appendix A to this Jurisdictional Statement. The November 5, 1982, order of the Alabama Supreme Court overruling appellants' application for rehearing is also unreported and appears as Appendix B to this Jurisdictional Statement. No opinion was written on rehearing.

JURISDICTION

The judgment order of the Supreme Court of Alabama dismissing appellants' appeal below was entered on October 21, 1981 (Appendix A, *infra*). On November 4, 1981, appellants timely filed an application for rehearing which, *inter alia*, drew into question the constitutionality of the state statutes pursuant to which their appeal had been dismissed, on grounds of the statutes' repugnance to the Fourteenth Amendment to the Constitution of the United States. *See* Appendix D, *infra*. One year and a day later, on November 5, 1982, appellants' application for rehearing was denied, *per curiam*, and without written opinion. *See* Appendix B, *infra*.

A Notice of Appeal was timely filed with the Supreme Court of Alabama on February 1, 1983 (Appendix C, *infra*), and a copy was filed with the Secretary of the Alabama Public Service Commission. This appeal is being docketed in this Court within ninety days from the denial of rehearing below. This Court has jurisdiction of this appeal by virtue of 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; or deny to any person in its jurisdiction the equal protection of the law.

Sections 37-1-125 through 37-1-130, and Sections 37-1-140 and 37-1-141 of the Code of Alabama (1975), and Rule 8 of the Alabama Rules of Appellate Procedure are set forth in Appendix E, *infra.*

STATEMENT OF THE CASE

This proceeding began on December 28, 1979, when the Alabama Power Company ("the Company") filed with the Alabama Public Service Commission ("the Commission") a petition seeking an approximate 122 million dollar rate increase. The Company's petition was denominated APSC Docket No. 17859, and was suspended for the statutory period of six months to allow for public hearing and investigation. The appellants herein, Jeremiah Temple, *et al.*, sought and were granted permission to intervene in Docket 17859.

Following some 15 separate days of evidence and testimony extending over a four-month period, the Commission issued an order allowing the Company an approximate 30.6 million dollar increase. The Com-

pany appealed directly to the Supreme Court of Alabama pursuant to state statute. *See* Code of Alabama (1975) §§37-1-140, *et seq.* Appellants were parties (appellees) to the Company's appeal by virtue of their having been granted intervenor status before the Commission below.

During the pendency of the Company's appeal, the Commission issued an order to all interested parties in Docket 17859 urging them to meet and attempt to reach a settlement which would resolve the Company's appeal. Four days of negotiations were held subsequent thereto, during which both the individual members of the Commission and the appellants herein took an active part. On March 4, 1981, a purported settlement was reached between the Company and the Commission which allowed the Company some 50 million dollars more, on annual basis, than the Company originally had been allowed by the Commission at the conclusion of the evidence and testimony in the case. No testimony was taken during the negotiations, and no evidence independently supporting the settlement figures proposed and adopted by the Commission was offered or introduced. Moreover, the settlement figures were made retroactively effective to a date some seven months prior to the negotiations.

Not all of the parties to the appeal (or the negotiations) joined in the settlement, and the appellants herein specifically raised objection to it. Nonetheless, the Company and the Commission obtained a remand of Docket 17859 from the Alabama Supreme Court in advance of judgment (a procedure which is specifically provided for by state statute, *see* Code of Alabama (1975) §37-1-143). Upon remand, the Com-

mission entered the disputed settlement agreement as its "final" order in APSC Docket No. 17859. In point of fact, the Company and certain other parties to the negotiations had insisted that the Commission bind itself to entry of the disputed settlement as its final order in Docket 17859 as a precondition to acceptance of the settlement terms. Two of the three Commissioners signed a statement agreeing to do so in advance of petitioning the Alabama Supreme Court for remand.

On the same day that it entered its final order in Docket 17859, the Commission also approved, without public hearing, rate schedules which had been filed by the Company in supposed compliance with the Commission's order, even though the appellants herein had moved on two separate occasions for public hearing with respect to the design of the Company's rates.

On April 14, 1981, appellants timely filed an appeal to the Supreme Court of Alabama challenging the purported settlement agreement on grounds that it violated their due process rights and contravened state law in several important respects. Specifically, appellants challenged the Commission's statutory authority to settle contested rate cases and, in particular, the Commission's authority to accept a *disputed* settlement agreement in a contested rate case while the case was pending on appeal (and where the Commission as a party to the appeal actively participated in the settlement negotiations).

During the pendency of the appeal, the Commission, in a subsequent administrative proceeding (APSC Docket No. 18148), altered the Company's fuel adjustment clause and ordered the Company to file "new

rates" to reflect the changes. Subsequent to the filing of those rates both the Company and the Commission moved to have the appellants' appeal dismissed on grounds that the "new rates" had supplanted the rates appealed from and that, therefore, the controversy had become moot. The Company and the Commission contended that since the appellants had not posted a stay or supersedeas bond in connection with their appeal, no refund could be ordered even if rates were found to have been unlawfully collected between the date the Commission's order was made effective and the date on which the appeal was rendered moot, and that therefore no relief could be granted appellants even if they were to prevail on the merits of their appeal.

The Supreme Court notified counsel for the parties that the motions to dismiss would be deemed submitted at the time of submission of the case on its merits. However, on October 21, 1981, the court, in advance of oral argument in the case, dismissed the appeal as moot. In so doing, the Supreme Court held that, "[I]t appears that the appeal is moot, *and* the appellants posted no supersedeas bond in connection with the appeal filed by them on April 14, 1981." *See* Appendix A, *infra* (emphasis added). The amount of the bond which would have had to have been posted by these appellants, all of whom are indigent, in order to stay or supersede the Commission's order below totalled in excess of 50 *million* dollars. A bond in like amount would have had to have been filed every six months during the pendency of the appeal. *See* Code of Alabama (1975) §37-1-129 (Appendix E, *infra*).

Appellants timely filed an Application for Re-

hearing in which, *inter alia*, the constitutionality of the application given certain state statutes by the Alabama Supreme Court in dismissing their appeal was drawn into question on Due Process and Equal Protection grounds. Appellants' application was denied one year and a day after it was filed, *per curiam*, and without written opinion. *See* Appendix B, *infra*.

THE FEDERAL QUESTION IS SUBSTANTIAL

The question presented by this appeal is not whether the appellants' appeal below was improvidently dismissed as being moot. As previously stated, the question presented is whether the Alabama statutes governing appeals in utility rate cases violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment, insofar as they have been applied to require the posting of a double bond as a precondition to restitution should the appellant in a utility rate case prevail on the merits of the appeal. If, as the appellants herein contend, the Alabama statutes are unconstitutional, then appellants would be entitled to restitution of any excess revenues found to have been unlawfully collected by the Company prior to the date the appellants' appeal otherwise became moot, and the appeal would have to be heard below. It is universally recognized that an appeal cannot be dismissed where collateral rights of the parties dependent upon decision will have been left undetermined if no decision is rendered on the appeal, even though the controversy is otherwise considered moot. *See, e.g., Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978); *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433 (1911). That principle is firmly established

in the courts of Alabama. *See, e.g., Willis v. Buchman,* 240 Ala. 386, 199 So. 892 (1940); *Postal Telegraph-Cable Co. v. City of Montgomery,* 193 Ala. 234, 69 So. 428 (1915); *Grant v. City of Mobile,* 50 Ala. App. 654, 282 So.2d 285 (1973).

The amount of money in question on appeal below totalled in excess of 50 million dollars, and there are approximately 900,000 residential customers of the Company who could be effected by the outcome of this appeal.

A. The Challenged Statutes, As Applied, Are Repugnant To The Equal Protection Clause Of The Fourteenth Amendment

It is generally accepted that a state is not required by the Federal Constitution to provide a right to appeal, or a system of appellate review, in the first instance. *See, e.g., McKane v. Durston,* 153 U.S. 684 (1894). But it is equally well recognized that where the right to appeal *is* afforded by statute, it cannot be granted to some litigants, and arbitrarily or capriciously denied to others, without violating the Equal Protection Clause. *Lindsey v. Normet,* 405 U.S. 56 (1972); *Lane v. Brown,* 372 U.S. 477 (1963); *Smith v. Bennett,* 365 U.S. 708 (1961). That is precisely the effect of the supersedeas bond requirement as applied by the Alabama Supreme Court in the present case.

The Alabama statutes provide for appeal *as a matter of right* by any party or intervenor in a utility rate case. *See* Code of Alabama (1975) §37-1-140 (Appendix E, *infra*). The appeal is taken directly to the Supreme Court of Alabama, and any party may stay

or supersede the Commission's order by posting bond in an amount *double* that by which the Company estimates its revenues will be increased or decreased, as the case may be, by reason of the stay or supersedeas. *See* Code of Alabama (1975) §§37-1-141; 37-1-127; 37-1-128. The statutes do not *require* that a stay or supersedeas bond be filed before the appeal may be heard, but the Alabama Supreme Court has applied the statutes to such effect in the present case.

On appeal below, the Supreme Court held that restitution of any amounts found to have been unlawfully collected by a utility during the pendency of an appeal from a utility rate case cannot be ordered unless a stay or supersedeas bond has been posted by the appellant. Therefore, in the absence of a stay or supersedeas, such an appeal can be rendered moot at any time the Commission accepts a new rate filing by the Company subsequent to the taking of the appeal. The subject of the litigation (the rates appealed from) will no longer be in issue, and since the party would not be entitled to restitution of any amounts which might be found to have been unlawfully collected during the pendency of the appeal, no effective relief can be granted even if the party prevails on the merits and the appeal will be dismissed.

The Alabama statutes provide that a utility can put new rates into effect merely by filing them with the Commission, and unless the Commission acts to suspend the rates, they will take effect at the expiration of thirty days (or a lesser time upon application by the utility and approval by the Commission). *See* Code of Alabama (1975) §37-1-81. The utility, then, merely by filing new rates with the Commission, and the Com-

mission, merely by declining to act on the rates and suspend them, can render an appeal from a prior rate order moot (absent a stay or supersedeas) practically at whim. And since supersedeas is discretionary with the court, and not a matter of right, an appeal can be placed in jeopardy merely by the court's refusal to grant a stay.

Thus, to the extent that the Alabama statutes, as applied, require consumer appellants in utility rate cases to post a multi-million dollar stay or supersedeas bond to protect from the possibility of having their appeal rendered moot, the statutes arbitrarily discriminate between those appellants (who generally *cannot* afford to post the required bond) on the one hand, and utility appellants or, for example, large industrial appellants (who generally *can* afford to post the required bond) on the other hand, in violation of the Equal Protection Clause of the Fourteenth Amendment. All parties to utility rate cases have been granted the *right* to appeal by the Alabama Legislature; but the practical ability to exercise that right has been effectively foreclosed to consumer appellants in such cases, who generally cannot afford to post the bond required to protect their appeal from being rendered moot at the whim of the other parties to the appeal.

Moreover, basic hornbook law dictates that when a judgment has been reversed, any person who has conferred a benefit on another in accordance with that judgment is entitled to restitution. *See also United States Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); Restatement of Restitution §74 (1937). There is no blanket exemption from that

equitable principle where utility rate increases are concerned. *See, e.g., Bebchick v. Public Utilities Commission,* 318 F.2d 187 (D.C. Cir.), *cert. denied,* 373 U.S. 913 (1963); *Williams v. Washington Metropolitan Area Transit Commission,* 415 F.2d 922 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1081 (1969).

This Court has itself held that the Federal Power Commission (now the Federal Energy Regulatory Commission) can mandate a refund where its orders have been overturned as a result of judicial review, even though the Commission does not have the power to enter reparations orders generally. *See, e.g., United Gas Improvement Co. v. Calley Properties, Inc.,* 382 U.S. 223 (1965). And in *Atlantic Coastline Railroad Co. v. Florida,* 295 U.S. 301 (1935), Justice Cardoza applied the general principle that notions of equitable restitution require the return of monies collected under an invalidated rate order in an appeal from the Interstate Commerce Commission. *See* 295 U.S. at 309. This Court did not order restitution in that case because of the particular equities involved; but four dissenters opined that the majority, by refusing to order restitution—even on equitable bases—was treading on shaky ground. *See also Securities & Exchange Commission v. Chenery Corp.,* 332 U.S. 194 (1947).

In no other type of civil case in Alabama is the appellant required to stay or supersede the judgment appealed from as a precondition to restitution should the party prevail on the merits of the appeal. And to the extent that the Alabama statutes, as applied, require consumer appellants in utility rate cases to supersede the judgment as a precondition to relief, the statutes also arbitrarily discriminate between appellants in

utility rate cases on the one hand, and all other civil litigants generally, on the other, in violation of the Equal Protection Clause of the Fourteenth Amendment.

Nor can the challenged classifications be saved on grounds that they bear some rational relationship to a legitimate state purpose. *Cf., e.g., Royster Guano Co. v. Virginia,* 253 U.S. 412 (1920). Admittedly, there is a legitimate state interest in protecting the appellee during the pendency of an appeal. But it should be very clear that there can be no rational basis for requiring a party in a utility rate case to post a stay or supersedeas bond when that party has no desire to stay the effect of the judgment. Absent a stay or supersedeas, the utility appellee will be permitted to collect the challenged rates during the pendency of the appeal, and therefore no possible harm could come to the utility if a stay is not obtained. It therefore serves no rational purpose to *require* the appellant to stay the order as a precondition to restitution, or to protect his right to prosecute the appeal. *See, e.g., Dixon v. Davis,* 521 S.W.2d 442 (Mo. 1975). Indeed, such a requirement is patently irrational. Under the challenged Alabama statutes, as applied, the only circumstance under which a consumer appellant will be entitled to restitution is if he has had the Commission's order stayed, in which case restitution will not be necessary since the Company will not have been collecting under the challenged rates during the pendency of the appeal. Conversely, if the order is not stayed and the consumer prevails on appeal he will *need* restitution, but he will not be entitled to it because the order was not stayed or superseded.

Even if it could be said that mandating a stay in utility rate cases served some legitimate state interest, requiring a bond in an amount *double* that by which the utility estimates it would be harmed if the stay is granted is *clearly* unconstitutional. *See Lindsey v. Normet*, 405 U.S. 56 (1972). Section 37-1-128 of the Code of Alabama (1975) provides that the purpose of the stay bond is "to pay all loss or damage as any person, firm or corporation may sustain in the event the order or action of the Commission shall be sustained." Pursuant to Section 37-1-127, the utility must state, under oath, the estimated approximate amount by which its revenues will be increased or decreased, as the case may be, by reason of the stay or supersedeas. That amount should fairly and accurately reflect the loss or damage the Company might sustain if the order is stayed and subsequently upheld on appeal. While admitting that protection of the litigated property serves a legitimate state interest, the automatic *doubling* of the amount involved bears no rational relationship to that purpose, and thus patently violates the Equal Protection Clause. *See Lindsey v. Normet, supra.*

In *Lindsey* this Court soundly rejected the argument that double bond requirements legitimately operate to screen out frivolous appeals, and concluded that such a requirement unconstitutionally burdens the right to appeal. 405 U.S. at 79. Under the equal protection analysis advanced in *Lindsey*, a number of jurisdictions have concluded that the mere existence of a double bond requirement that is applicable to some civil litigants and not to others violates the Fourteenth Amendment. *See, e.g., Saharoff v. Stone*, 638 F.2d 90 (9th

Cir. 1980); *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976); *Modrok v. Marshall*, 523 P.2d 172 (Alaska 1974). The Alabama Supreme Court has itself sustained constitutional challenge to double bond requirements. *See, e.g., Hartwell v. State*, 225 Ala. 206, 142 So. 678 (1932); *Lassitter v. Lee*, 68 Ala. 287 (1880); *Whitworth v. Anderson*, 54 Ala. 33 (1875); *Stoudenmire v. Brown*, 48 Ala. 699 (1872).

While *Lindsey* involved a double bond required as a precondition to appeal, that distinction is entirely irrelevant in the present instance. In order to form a useful framework for review, it is necessary for this Court to look to the *effect* of the statutes in question, and measure the results against the appropriate constitutional standards. "A [bond] requirement valid on its face may offend the Constitution as applied to a particular case." *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 861 (9th Cir. 1976), *See also Boddie v. Connecticut*, 401 U.S. 371, 380 (1971). While the bond required in the present instance is not a *per se* bar to consumer appeals in utility rate cases, it is so *in its effect* since, as already pointed out, as a very real practical matter no consumer can ever afford to post the required bond and since, absent supersedeas, no relief can be granted and the appeal can be rendered moot almost at whim of the Company or Commission.

Moreover, requiring the appellant in a utility rate case to post a bond that is unrelated to any valid state purpose, and which is not required of any other class of civil litigants as a condition for a stay of execution *itself* violates the Equal Protection Clause. *See Usher v. Waters Insurance & Realty Co.*, 438 F.Supp. 1215

(W.D. N.C. 1977); *Rice v. Lucas*, 560 S.W.2d 850 (Mo. 1978). Pursuant to Rule 8 of the Alabama Rules of Appellate Procedure, a civil litigant wishing to stay or supersede a judgment for the payment of money only must post (in addition to the appeal bond required of all civil litigants) a supersedeas bond in an amount equal to 150% of the amount of the judgment if the judgment does not exceed $10,000.00, or 125% if the judgment exceeds $10,000.00 (as would usually be the situation in a utility rate case). Those sections have been supplanted, insofar as appeals in utility rate cases are concerned, by Sections 37-1-141 and 37-1-125 through 37-1-130 of the Code of Alabama (1975), which require the posting of a supersedeas bond (in addition to the appeal bond) in an amount equal to *200%* of the amount by which the utility estimates its revenues will be increased or decreased, as the case may be, if a stay or supersedeas is granted. Thus, like the statutory scheme successfully challenged on constitutional grounds in *Usher v. Waters, supra,* the double bond scheme challenged in the present case (again) arbitrarily discriminates between appellants in utility rate cases on the one hand, and all other civil appellants, generally, on the other, in violation of the Equal Protection Clause of the Fourteenth Amendment.

In sum, the practical effect of the Alabama Supreme Court's application of state statute in the present case is two-fold: First, the appellants are required, as a precondition to the granting of relief should they prevail on the merits of their appeal, to post a supersedeas bond *not* required of any other class of civil appellants in the state; and, second, since the amount of the stay

or supersedeas bond required in utility rate cases is almost always prohibitive to consumer appellants, they are arbitrarily denied any *effective* right of appeal in such cases. The double bond requirement at issue in the present case arbitrarily and irrationally discriminates between utility rate case appellants and appellants in all other civil cases; and between affluent utility rate case appellants (and utility appellants), who generally *can* afford to post the required bond, and consumer appellants, who generally *cannot* afford to post the required bond. Such discrimination is unrelated to any legitimate state interest and renders the challenged statutory scheme violative of Equal Protection and unconstitutional.

Moreover, the manner in which the double bond challenged in the present case operates to preclude some, if not all, consumer appellants from exercising their statutory *right* to appeal in utility rate cases (*see* Code of Alabama (1975) §37-1-140, Appendix E, *infra*) violates the Equal Protection Clause in that it arbitrarily forecloses the opportunity to be heard on appeal. The legislature cannot grant consumers the *right* to appeal in such cases, and then foreclose the exercise of that right by effectively conditioning appeal on the posting of a bond which is unrelated to any legitimate state interest; not required of any other class of civil litigants; and is beyond the means of most, if not all, consumers to afford.

B. The Challenged Statutes, As Applied, Are Repugnant To The Due Process Clause Of The Fourteenth Amendment

In *Boddie v. Connecticut*, 401 U.S. 371 (1971),

this Court held unconstitutional a state law conditioning a judicial decree of divorce upon the claimant's ability to pay court costs and fees, stating that "the legitimacy of the state's monopoly over techniques of final dispute settlement" becomes suspect when a party is denied *full* access to the judicial proceeding which is "the only effective means of resolving the dispute at hand." 401 U.S. at 375-76. *Boddie* certainly cannot be read to guarantee access to every court in every instance, but it must be read to support the proposition that the due process clause guarantees *meaningful* access to judicial processes (1) when resort to the courts is the sole path to relief and (2) governmental control over the processes for defining rights and obligations is exclusive. "Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given *a meaningful opportunity to be heard.*" *Boddie v. Connecticut*, 401 U.S. at 377. *See also Armstrong v. Manzo*, 380 U.S. 545 (1965); *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950); *Lecates v. Justice of Peace Court No. 4*, 637 F.2d 898 (3rd Cir. 1980).

In the present instance, the Alabama Code defines the procedures that establish a "meaningful opportunity to be heard" in utility rate cases. Pursuant to the Code, parties have a right to intervene in rate cases, must be accorded due process of law in all such proceedings before the Commission, and may appeal directly to the Alabama Supreme Court from any action or order of the Commission *as a matter of right.* Having granted consumer appellants those rights, the

State may not, consonant with due process, render the opportunity to *enjoy* them dependent on the appellant's financial means. *Boddie v. Connecticut, supra.*

When the Company resorted to the Commission for a rate increase in the present case, appellants had no reasonable alternative but to pursue the administrative and judicial processes established by the State. From that point, appellants were "at the mercy of the government, which h[eld] exclusive dominion over the means to secure or protect the[ir] respective legal rights and interests." *Lecates v. Justice of Peace Court No. 4*, 637 F.2d 898, 908 (3rd Cir. 1980). And once brought within the ambit of the State's power, appellants must be guaranteed "equal recourse to the complete range of trial machinery by which the State declares legal rights and imposes legal obligations." *Id.* at 907. Since appellants in the present case complained that their due process rights had been violated by the Commission below, resort to the Alabama Supreme Court was the only effective means of resolving their dispute. Under the teachings of *Boddie* and *Lecates, supra,* the Due Process Clause guarantees appellants *meaningful* access to the appellate process under such circumstances, unconditioned upon their financial ability to post a supersedeas bond.

This Court recently extended due process protection to terminations of utility services. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978). In so doing, the Court expressly recognized that "utility service is a *necessity of modern life;* indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety." 436 U.S. at 18 (emphasis added). It therefore logically follows

that due process must be accorded in determining the rate which must be paid for such service since the exaction of an unreasonable rate might very well lead to termination of utility service for a number of the utility's customers. Those customers face a potentially "grievous loss" and, accordingly, must be afforded due process protection under the rationale of *Morissey v. Brewer*, 408 U.S. 471 (1972). *But see, e.g., Georgia Power Project v. Georgia Power Co.*, 409 F.Supp. 332 (N.D. Ga. 1975); *Sellers v. Iowa Power & Light Co.*, 372 F.Supp. 1169 (S.D. Iowa 1974).

Even assuming that there is no *per se* property interest in any specific rate to be paid for utility service, the consumer in Alabama is entitled, *by statute*, to "just and reasonable rates." *See* Code of Alabama (1975) §37-1-80. Applying the entitlement test enunciated by this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972), then, the consumer in Alabama has a legitimate protected property interest in just and reasonable rates stemming from an independent state law source (statute). Therefore, a *meaningful* opportunity for judicial review of Commission established utility rates must be afforded.

Finally, an interest need not be vested by statute in order to rise to a level sufficient to require protection under the Due Process Clause. The earliest Supreme Court cases grounded protected interests on either constitutional or common law claims of right. *See, e.g., Tumey v. Ohio*, 273 U.S. 510 (1927). *See also Powell v. Alabama*, 287 U.S. 45 (1932); *Ownbey v. Morgan*, 256 U.S. 94 (1921); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856).

It is a "principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby." *Arkadelphia Milling Co. v. St. Louis Southwestern Railway*, 249 U.S. 134 (1919). *See also Baltimore & Ohio Railroad v. United States*, 279 U.S. 781 (1929); *Atlantic Coast Line Railroad v. Florida*, 295 U.S. 301 (1935). That principle is no less applicable to erroneous orders of an administrative agency, than it is to erroneous orders of a court. *See, e.g., United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956). Moreover, while the principle of restitution is firmly rooted in the common law, it is also clearly encompassed within the property protected by the Alabama Constitution. *See* Constitution of Alabama (1901) Art. 1, §13. As a fundamental right, restitution cannot be unreasonably, arbitrarily or oppressively burdened by the legislature, as by conditioning the exercise of that right on the posting of a multimillion dollar stay bond which is unrelated to any legitimate state interest.

Thus, to the extent that the challenged Alabama statutes, as applied, require consumer appellants in utility rate cases to post a multimillion dollar stay bond which is unrelated to any countervailing state interest of overriding significance as a precondition to the exercise of certain of their fundamental rights (as described above), the statutes are repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

C. There Is A Conflict of Authority Among The

States Which Deserves Resolution By This Court

Among the highest courts of the states to have considered whether restitution can be awarded a successful consumer appellant in a utility rate case absent a stay or supersedeas, two distinct lines of authority have developed. One line of mostly older cases holds, as did the Alabama Supreme Court in the present case, that restitution *cannot* be awarded unless the appellant has posted a stay or supersedeas bond. *See, e.g., Keco Industries, Inc. v. Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254, 141 N.E.2d 465, *cert. denied*, 355 U.S. 182 (1957); *Mandel Brothers, Inc. v. Chicago Tunnel Terminal Co.*, 2 Ill.2d 205, 117 N.E.2d 774 (1954). That rule is premised on an apparent misconstruction of precedent emanating from this Court, and has been soundly criticized by legal scholars. *See, e.g.*, Levin, *Illinois Public Utility Law and the Consumer: A Proposal to Redress the Imbalance*, 26 De Paul L. Rev. 259 (1977).

In *Arizona Grocery Co. v. Atchinson Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932), this Court held that where an administrative agency has approved a rate and the rate has become final, *the agency* cannot later *on its own initiative or as the result of a collateral attack* make a retroactive determination of a different rate and require reparations. That rule, of course, is well recognized in every jurisdiction; but cannot, and must not, be read (as it was by the courts in the cases cited above) to proscribe refund as the result of a direct, statutorily authorized judicial review of an administrative order.

A second line of authority has developed in those cases considering the question (for the most part) more recently. In *Mountain States Telephone & Telegraph Co. v. Public Utilities Commission,* 502 P.2d 945 (Colo. 1972), for example, the Supreme Court of Colorado, sitting *en banc,* construed an administrative appeal statute similar to Alabama's (*see* Code of Colorado (1973) §40-6-116), and held it to present no impediment to requiring a refund of over-collected utility rates where no supersedeas or stay bond had been posted on appeal. The Supreme Court of Colorado explicitly acknowledged those decisions of the highest state courts holding contra, but chose *not* to adopt that result. The *Mountain States* view has been followed in a number of other jurisdictions. *See, e.g., Northwestern Bell Telephone Co. v. State,* 216 N.W.2d 841 (Minn. 1974); *Mountain States Telephone & Telegraph Co. v. Arizona Corporate Commission,* 124 Ariz. 433, 604 P.2d 1144 (Ariz. App. 1979); *In re Granite State Electric Co.,* 421 A.2d 121 (N.H. 1980). These courts have generally recognized that the practical unavailability of either a stay mechanism or a refund should the party prevail on appeal would suggest *serious* constitutional shortcomings. *See, e.g., Mountain States Telephone & Telegraph Co. v. Arizona, supra,* 124 Ariz. at 435, 604 P.2d at 1146. *But see, Committee of Consumer Services v. Pacific Service Commission of Utah,* 638 P.2d 533 (Utah 1981).

There is, thus, a conflict of authority among the highest courts of the states to have considered whether restitution may be awarded successful consumer appellants in utility rate cases absent a stay or super-

sedeas. Since the conflict derives, in no small measure, from differing interpretations of precedent emanating from this Court, the conflict is deserving of resolution in this appeal. This is a question which has not been previously addressed by this Court, and which is undoubtedly bound to recur; therefore, resolution is imperative to ensure uniformity of treatment among the citizens of the various states. One's constitutional rights should not lie dependent on the jurisdiction in which one resides.

CONCLUSION

The question presented by this appeal is substantial and of public importance and therefore deserves plenary consideration, with brief on the merits and oral argument, for its resolution.

Probable jurisdiction should be noted.

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Attorney for Appellants

February 1983

APPENDIX A

October 21, 1981

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1981-82

80-462

JEREMIAH TEMPLE, ET AL.

V. APSC DOCKET NOS. 17667 and 17859

THE ALABAMA PUBLIC SERVICE COMMISSION, ET AL.

ORDER

The appellees Alabama Power Company and Alabama Public Service Commission have moved this Court to dismiss the appeal. Upon consideration thereof, it appears that the appeal is moot, and the appellants posted no supersedeas bond in connection with the appeal filed by them on April 14, 1981.

IT IS, THEREFORE, ORDERED that the appeal be, and it is hereby, dismissed.

IT IS FURTHER ORDERED that the appellants Jeremiah Temple, Napolean Turner, Rosa Lee Turner, Lovenia Harris, James B. Thrasher, Emma Richardson, Alice Elmore, Hal Patterson, Jessie Murray, R. C. Gary, and Lillian Bilbro and Robert J. Varley and Marvin Campbell, as sureties for the costs of appeal, pay the costs of appeal as provided by the Alabama Rules of Appellate Procedure, and it appearing that

said parties have waived their rights of exemption under the laws of Alabama, it is ordered that execution issue accordingly.

Torbert, C. J., and Maddox, Jones, Shores, and Beatty, JJ., concur.

J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court, Witness my hand this 21st day of Oct., 1981.

J. O. SENTELL
Clerk, Supreme Court of Alabama

APPENDIX B

November 5, 1982

Re: 80-462

JEREMIAH TEMPLE, ET AL.
Appellant

vs.

THE ALABAMA PUBLIC SERVICE COMMISSION, ET AL.
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

.....Appeal docketed. Future correspondence should refer to the above number.

.....Court Reporter granted additional time to file reporter's transcript to and including

.....Clerk/Register granted additional time to file clerk's record/record on appeal to and including

.....Appell.....granted 7 additional days to file briefs to and including

.....Appellant(s) granted 7 additional days to file reply briefs to and including

.....Record on Appeal filed

.....Appendix Filed

.....Submitted on Briefs

.....Petition for Writ of Certiorari denied. No opinion.

XXXX Application for rehearing overruled. No opinion written on rehearing. PER CURIAM-ALL THE JUSTICES CONCUR.

.....Permission to file amicus curiae briefs granted

.....

11-5-82
wo

DOROTHY F. NORWOOD
Acting Clerk, Supreme Court of Alabama

APPENDIX C

[Filed, February 1, 1983]

IN THE SUPREME COURT OF THE STATE OF ALABAMA

JEREMIAH TEMPLE, *et al.*,
Appellants,

v. S.C. NO. 80-462

ALABAMA PUBLIC SERVICE COMMISSION, *et al.*,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Appellants above named, Jeremiah Temple, *et al.*, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Alabama overruling Appellants' Application for Rehearing and dismissing their appeal, which was entered in this action on November 5, 1982.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ Robert J. Varley
ROBERT J. VARLEY

LEGAL SERVICES CORPORATION OF ALABAMA
900 Bell Building
207 Montgomery Street
Montgomery, Alabama 36104
(205) 832-4570
Attorney for Appellants

CERTIFICATE OF SERVICE

I, Robert J. Varley, counsel of record for the Appellants, Jeremiah Temple, *et al.*, and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 1st day of February, 1983, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on each of the several parties thereto, as follows:

1. On the Alabama Public Service Commission, by filing a copy with the Secretary of the Commission and by mailing a copy in a properly addressed envelope, with first-class postage prepaid, to the Honorable Euel A. Screws, Jr., the Commission's counsel of record, at the offices of Copeland, Franco, Screws & Gill, P.A., Post Office Box 347, Montgomery, Alabama 36101.

2. On the Alabama Power Company, by mailing a copy in a properly addressed envelope, with first-class postage prepaid, to the Honorable John Bingham, its counsel of record, at the offices of Balch, Bingham, Baker, Hawthorne, Williams & Ward, Post Office Box 306, Birmingham, Alabama 35201.

3. On the State of Alabama, by mailing a copy in a properly addressed envelope, with first-class postage prepaid, to the Honorable Wendell Cauley, Assistant Attorney General, at the offices of the Consumer's Utility Counsel Section, First Federal Savings & Loan Association Building, Suite 701, 100 Commerce Street, Montgomery, Alabama 36104.

4. On the Alabama League of Aging Citizens, Inc., by mailing a copy in a properly addressed envelope,

with first-class postage prepaid, to its counsel of record, the Honorable Mark H. Elovitz, 407 Woodward Building, Birmingham, Alabama 35203.

5. On Mr. R. S. Crowder, 1308 South 17th Street, Birmingham, Alabama 35205, by mailing a copy to him in a properly addressed envelope with first-class postage prepaid.

6. On Airco, Inc., Alabama Metallurgical Corporation, Ciba-Geigy Corporation, Courtalds North America, Inc., Diamond Shamrock Corporation, Ideal Basic Industries, Inc., Kimberly-Clark Corporation, Monsanto Company, Ohio Ferro-Alloys, Olin Corporation, Stauffer Chemical Company, Union Carbide Corporation and Uniroyal, Inc. (collectively known as the "Alabama Industrial Group"), by mailing a copy in a properly addressed envelope, with first-class postage prepaid, to their counsel of record, the Honorable James D. Brooks, at the offices of Reams, Wood, Vollmer, Phillips, Killian & Brooks, P.C., Post Office Box 158, Mobile, Alabama 36608.

It is further certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

/s/ Robert J. Varley
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Attorney for Appellants

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

JEREMIAH TEMPLE, et al.,
Appellants,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, et al.,
Appellees.

S.C. No. 80-462

APPEAL FROM THE ORDER OF THE ALABAMA PUBLIC SERVICE COMMISSION DATED MARCH 12, 1981, APSC DOCKET NOS. 17667 and 17859

APPLICATION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF ALABAMA:

On April 14, 1981, Appellants Jeremiah Temple, *et al.*, filed their notice of appeal in the instant case challenging an alleged "settlement" by the Alabama Public Service Commission (hereinafter "the Commission") of two Alabama Power Company (hereinafter "the Company") rate cases (APSC Docket Nos. 17667 and 17859). The appeal raises serious constitutional questions and implications of great concern to the Company's ratepayers and to the general public of this State. Specifically, the appeal challenges the constitutional power and authority of the Commission to

"settle" rate cases in the first instance, and further challenges, on constitutional grounds, the Commission's wholly arbitrary and capricious actions in "settling" the subject cases and making the rates established thereby *retroactive* for a period of some seven months. The gravity of the issues raised by this appeal, and their import to the public interest in general, was recognized by the Appellee Commission in its June 17, 1981, motion seeking a 28-day extension of time in which to file its Brief on the merits, wherein the Commission stated: "This present appeal . . . involve [sic] a matter greatly within the public interest, viz, whether a settlement of a major rate case should or should not be approved . . . ." (At p. 1). Thereafter, on July 30, 1981, both the Company and the Commission moved to dismiss the instant appeal on grounds that no supersedeas bond had been posted by the Appellants, and that the Company had, in July of 1981, filed new rate schedules pursuant to Commission order after hearing on the Company's fuel adjustment clause. Citing *Airco, Inc. v. Alabama Public Service Commission*, 360 So.2d 970 (Ala. 1978), both the Company and Commission argued that the instant appeal was moot. By Order dated October 21, 1981, the Maddox Division of this Court, in advance of oral argument, dismissed the instant appeal as moot, on grounds that "appellants posted no supersedeas bond in connection with the appeal filed by them on April 14, 1981." (Order at p. 1). Pursuant to Sections 37-1-142 and 37-1-125 through 37-1-130, *Code of Alabama (1975)*, the amounts of the supersedeas bonds which would have had to have been posted by these Appellants, all of whom are indigent, would have totaled in excess of one hundred (100) *million* dollars.

Come now Appellants Jeremiah Temple, *et al.*, and respectfully make application for rehearing in this cause, and move this Court to vacate and set aside its Order of Dismissal entered in the instant appeal on October 21, 1981. As grounds for their application, Appellants assign separately and severally the following:

1. The issues raised by the instant appeal involve a matter greatly within the public interest; therefore, the appeal is not moot.

2. The issues raised by the instant appeal involve the power and authority of public officials in the administration of their duties according to law, and determination of the issues will serve as a guide to said public officials who may be called upon to act again in the same or similar manner; therefore, the appeal is not moot.

3. The issues raised by the instant appeal are capable of repitition while evading review; therefore, the case is not moot.

4. Collateral rights of the parties dependent upon determination of this appeal will be left unresolved if this case is not decided on its merits; therefore, the appeal is not moot.

5. New rates for the Company were not put into effect subsequent to the filing of the instant appeal; therefore, the case is not moot.

6. The rule announced by this Court in *Airco, Inc. v. Alabama Public Service Commission*, 360 So.2d 970 (Ala. 1978), and relied upon by this Court in dismissing the instant appeal is due to be over.uled.

7. The interpretation placed by this Court upon Sections 37-1-142 and 37-1-125 through 37-1-130, *Code of Alabama (1975)*, (the supersedeas bond provisions) in the October 21, 1981, Order dismissing the instant appeal renders those Sections repugnant to the Constitution of Alabama and to the Due Process clause of the Fourteenth Amendment to the Constitution of the United States.

8. The interpretation placed by this Court upon Sections 37-1-142 and 37-1-125 through 37-1-130, *Code of Alabama (1975)* (the supersedeas bond provisions) in the October 21, 1981, Order dismissing the instant appeal renders those Sections repugnant to the Constitution of Alabama and to the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States.

9. It was error for this Court not to hear and determine the Company's and Commission's motions to dismiss *en banc*.

10. It was error for this Court to hear and determine the Company's and Commission's motions to dismiss in advance of oral argument.

WHEREFORE, THE PREMISES CONSIDERED, Appellants Jeremiah Temple, *et al.*, respectfully urge this Court to reconsider, and to vacate and set aside, its Order of Dismissal entered in the instant appeal on October 21, 1981, and to reinstate this cause on its present docket for oral argument on the merits.

Respectfully submitted,

Robert J. Varley

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OF ALABAMA, INC.

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(205) 264-1471

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Application for Rehearing on all parties of record to this proceeding by placing same in the United States mail, properly addressed and postage prepaid, on this the 4th day of November, 1981.

Robert J. Varley

APPENDIX E

Alabama Statutory Provisions Involved

§ 37-1-125. Superseding order — Right to supersede order by giving bond.

On any such appeal any utility, interested party or intervenor may supersede any order or judgment entered by giving such supersedeas bond or bonds as may be appropriate to the proceedings as provided for in this division. (Acts 1932, Ex. Sess., No. 232, p. 233; Acts 1935, No. 228, p. 624; Code 1940, T. 48, § 81.)

§ 37-1-126. Same — Order of stay or supersedeas.

An appeal to the circuit court of Montgomery county shall not stay or supersede the order or action of the commission appealed from. Subject to the provisions of this division, the circuit court may, upon hearing and notice, and after consideration of the testimony taken before the commission, stay or supersede the order or action of the commission.

(1) If the appeal to the circuit court is from an order of the commission reducing or refusing to increase rates, fares or charges, or any of them, or any schedule or part or parts of any schedule, of such rates, fares or charges, the circuit court shall not direct or order a supersedeas or stay of the action or order appealed from without requiring, as a condition precedent to the granting of such supersedeas, that the utility applying for the same shall execute and file with the clerk of said court a bond which shall be as provided in this division.

(2) If the circuit court shall fail or refuse to grant such supersedeas, a utility may petition the supreme

court to order a supersedeas and stay of the action or order of the commission appealed from, and any such order, if entered by the supreme court, shall likewise only be entered conditioned upon the execution and filing of the supersedeas bond as provided in this division. (Acts 1909, No. 42, p. 96; Code 1923, § 9838; Code 1940, T. 48, § 84.)

§ 37-1-127. Same — Statement of approximate effect on revenues.

In the application for supersedeas, the utility shall, under oath, state the estimated approximate amount by which its revenues will be increased or reduced as the case may be, in six months, by reason of the increased rate sought by it or the reduced rate complained of. (Acts 1909, No. 42, p. 96; Code 1923, § 9839; Code 1940, T. 48, § 85.)

§ 37-1-128. Same — Amount of bond.

The bond required to be filed as provided in this division in order to supersede an order of the commission shall be double the sum estimated under section 37-1-127, with two or more sureties, to be approved by the judge, one of which may be a surety company, payable to the state of Alabama and conditioned to pay all such loss or damage as any person, firm or corporation may sustain, including all such excess rates, fares or charges as such person, firm or corporation may have paid pending the appeal to the circuit court, or any subsequent appeal to the supreme court, in the event the order or action of the commission shall be sustained. (Acts 1909, No. 42, p. 96; Code 1923, § 9840; Code 1940, T. 48, § 86.)

§ 37-1-129. Same — Additional bond.

An additional bond of like amount and with the same conditions shall be given at the end of each six months pending the appeal to the circuit court of Montgomery county and pending any subsequent appeal by any party to the supreme court. (Acts 1909, No. 42, p. 96; Code 1923, § 9841; Code 1940, T. 48, § 87.)

§ 37-1-130. Same — Order stayed and superseded upon giving bond; termination of stay or supersedeas.

After the required bond shall have been given, the order appealed from shall be stayed and superseded, and it shall be lawful for the utility to charge the rates, fares or charges which had been reduced by said order, or the rates, fares or charges sought to be established by its petition, until the final disposition of said case. If said utility shall fail after 30 days' written notice to give such additional bond at the end of each six months, pending any appeal, the stay or supersedeas shall terminate, and the rates, fares or charges established by statute or by the public service commission or by the order or action appealed from shall be revived and shall be the lawful rates pending all further proceedings in the case. (Acts 1909, No. 42, p. 96; Code 1923, § 9842; Code 1940, T. 48, § 88.)

§ 37-1-140. Direct appeal to supreme court as matter of right; preferred setting of appeals; time for taking appeals; bond required when appellant is utility or person.

In all cases involving controversies respecting rates and charges of telephone companies or public utilities,

an appeal from any action or order of the Alabama public service commission in the exercise of the jurisdiction, power and authority conferred upon it by this title, as amended and supplemented, shall lie directly to the supreme court of Alabama. All such appeals shall be given a preferred setting in the supreme court and shall be heard and determined by said court en banc. Nothing in this subdivision 2 shall be deemed to apply to any such cases other than those in which rates and charges are involved. All such appeals shall be taken within 30 days from the date of such action or order of the Alabama public service commission and shall be granted as a matter of right and be deemed perfected by filing with the public service commission a bond for the security of the cost of said appeal when the appellant is a utility or person, and by filing notice of an appeal when the appellant is the state of Alabama. (Acts 1978, No. 851, p. 1274, § 1.)

§ 37-1-141. Who may appeal; manner of taking appeal; application for supersedeas; supersedeas bonds; collection of denied rate increases prior to final disposition of case.

Either party or any intervenor may appeal to the supreme court from the action or order of the commission under the same rules and regulations and in the same manner and under the same conditions as are or may be provided by law for appeals from circuit courts in other public utility cases. Application for supersedeas may be made to the supreme court or a justice thereof. All supersedeas bonds required shall be in the same amount, subject to the same penalties and conditions and have the same effect as is now provided or may hereafter be provided by law in such cases.

If the appeal is by a telephone company or a public utility and supersedeas is granted, the appellant shall be entitled to collect, subject to refund with interest, any portion of the requested increase denied on any rate decrease directed by such supersedeas order from the time of taking such appeal until final disposition of the case. (Acts 1978, No. 851, p. 1274, § 2.)

Rule 8.

Stay or injunction pending appeal.

(a) *Stay by supersedeas bond.* The appellant shall not be entitled to a stay of execution of the judgment pending appeal (except as provided in ARCP Rule 62(e)) unless he executes bond with good and sufficient sureties, approved by the clerk of the trial court, payable to appellee (or to the clerk or register if the trial court so directs), with condition, failing the appeal, to satisfy such judgment as the appellate court may render, when the judgment is:

(1) For the payment of money only, in an amount equal to 150% of the amount of the judgment if the judgment does not exceed $10,000.00, or 125% if the judgment exceeds $10,000.00;

(2) For the payment of money and also for the performance of some other act or duty, or for the recovery or sale of property or the possession thereof, in such sum, in addition to the sum required for money judgments only in (1) above, as the trial court may in writing prescribe; or if appellant wishes to supersede the judgment as to the payment of money only, the requirements of (1) above shall apply;

(3) Only for the performance of some act or duty, or for the recovery or sale of property or the possession thereof (or if the judgment includes the payment of money and appellant does not wish to supersede the judgment in that respect), in such sum as the trial court may in writing prescribe.

The approval of the supersedeas bond by the clerk of the trial court, unless contested by the opposing party, shall constitute a stay of the judgment when the judgment is for the payment of money only, or the payment of money and some other act and the appellant wishes to supersede the judgment as to the payment of money only. In the event the clerk declines to approve the bond, or his approval is contested, the requirements of (b) below shall apply.

(b) *Stay must ordinarily be sought in the first instance in trial court; motion for stay in appellate court.* In a civil action, application for a stay of the judgment or order of a trial court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the trial court. A motion for such relief may be made to the appellate court in which the appeal is pending, but the motion shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn state-

ments or copies thereof. With the motion shall be filed such photocopied parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk of the appellate court.

When the judgment or order of a trial court is for the payment of money only, the filing and approval of a supersedeas bond conditioned as required by law shall operate to stay and suspend the execution of such judgment or order. The action of the clerk of the trial court in either approving or refusing to approve a supersedeas bond shall be subject to review by the trial court.

(c) *Stay may be conditioned upon giving of bond; proceeding against principals and sureties.* Relief available in the appellate court under this rule may be conditioned upon the filing of a bond or other appropriate security in the trial court. If security is given in the form of a bond or other undertaking with one or more sureties, each principal and each surety, jointly and severally, submit themselves to the jurisdiction of the trial court and irrevocably appoint the clerk of the trial court as their agent upon whom any papers affecting their liability on the bond or undertaking may be served. Their liability may be enforced on motion in the trial court without the necessity of an independent action. The motion and such notice of the motion as the trial court prescribes may be served on the clerk of the trial court, who shall forthwith mail copies to each principal and each surety if their addresses are known.

(d) *Stays in criminal cases.*

(1) DEATH. A sentence of death shall be stayed by the trial court if an appeal is taken. The appellate court shall fix the date of execution if the appeal is affirmed and may make appropriate orders upon disposition of the appeal or other review.

(2) IMPRISONMENT. A sentence of imprisonment or hard labor for the county or to the penitentiary shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail.

(3) FINES. A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the trial court or by the appellate court upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs with the clerk of the court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

(4) PROBATION. An order placing the defendant on probation shall be stayed if an appeal from a judgment of conviction is taken, and the time while such appeal is pending shall not be credited as service of the probationary sentence.

APPENDIX F

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO.....

JEREMIAH TEMPLE, *et al.*,
Appellants,

v.

ALABAMA PUBLIC SERVICE
COMMISSION, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA

NOTICE TO STATE ATTORNEY GENERAL THAT CONSTITUTIONALITY OF STATE STATUTES IS DRAWN INTO QUESTION

This proceeding draws into question the constitutionality of certain provisions of the Code of Alabama, as applied, namely, those provisions relating to the posting of a stay or supersedeas bond by appellants in utility rate cases as a precondition to restitution should the appellant prevail on the merits of the appeal, Sections 37-1-141 and 37-1-125 through 37-1-130 of the Code of Alabama (1975). The State of Alabama

was a nominal party to the appeal below, but did not appear, file briefs or participate in the appeal in any other manner or respect. It is therefore noted that 28 U.S.C. §2403(b) may be applicable. The State Attorney General has been served with a copy of the Notice of Appeal, and with three (3) copies of the Appellants' Jurisdictional Statement.

CERTIFICATE OF SERVICE

I, Robert J. Varley, counsel of record for the Appellants, Jeremiah Temple, *et al.*, and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 1st day of February, 1983, I served a copy of the foregoing Notice to State Attorney General that Constitutionality of State Statutes is Drawn into Question on the Attorney General for the State of Alabama by mailing a copy in a properly addressed envelope, with first-class postage prepaid, to the Honorable Wendell Cauley, Assistant Attorney General, at the offices of the Consumer's Utility Counsel Section, First Federal Savings & Loan Association Building, Suite 701, 100 Commerce Street, Montgomery, Alabama 36104.

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APPENDIX G

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO. .....

JEREMIAH TEMPLE, *et al.*,
Appellants,

v.

ALABAMA PUBLIC SERVICE
COMMISSION, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALABAMA

CERTIFICATE OF SERVICE

I, Robert J. Varley, counsel of record for the Appellants, Jeremiah Temple, *et al.*, and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 1st day of February, 1983, I served three copies of the foregoing Jurisdictional Statement on each of the several parties hereto, as follows:

1. On the Alabama Public Service Commission, by mailing three copies in a properly addressed envelope,

with first-class postage prepaid, to the Honorable Euel A. Screws, Jr. the Commission's counsel of record, at the offices of Copeland, Franco, Screws & Gill, P.A., Post Office Box 347, Montgomery, Alabama 36101.

2. On the Alabama Power Company, by mailing three copies in a properly addressed envelope, with first-class postage prepaid, to the Honorable John Bingham, its counsel of record, at the offices of Balch, Bingham, Baker, Hawthorne, Williams & Ward, Post Office Box 306, Birmingham, Alabama 35201.

3. On the State of Alabama, by mailing three copies in a properly addressed envelope, with first-class postage prepaid, to the Honorable Wendell Cauley, Assistant Attorney General, at the offices of the Consumer's Utility Counsel Section, First Federal Savings & Loan Association Building, Suite 701, 100 Commerce Street, Montgomery, Alabama 36104.

4. On the Alabama League of Aging Citizens, Inc., by mailing three copies in a properly addressed envelope, with first-class postage prepaid, to its counsel of record, the Honorable Mark H. Elovitz, 407 Woodward Building, Birmingham, Alabama 35203.

5. On Mr. R. S. Crowder, 1308 South 17th Street, Birmingham, Alabama 35205, by mailing three copies to him in a properly addressed envelope with first-class postage prepaid.

6. On Airco, Inc., Alabama Metallurgical Corporation, Ciba-Geigy Corporation, Courtalds North America, Inc., Diamond Shamrock Corporation, Ideal Basic Industries, Inc., Kimberly-Clark Corporation,

Monsanto Company, Ohio Ferro-Alloys, Olin Corporation, Stauffer Chemical Company, Union Carbide Corporation and Uniroyal, Inc. (collectively known as the "Alabama Industrial Group"), by mailing three copies in a properly addressed envelope, with first-class postage prepaid, to their counsel of record, the Honorable James D. Brooks, at the offices of Reams, Wood, Vollmer, Phillips, Killian & Brooks, P.C., Post Office Box 158, Mobile, Alabama 36608.

It is further certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

/s/ Robert J. Varley
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No. 82-1293

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JEREMIAH TEMPLE, et al.,
Appellants,

v.

ALABAMA PUBLIC SERVICE COMMISSION
and ALABAMA POWER COMPANY,
Appellees.

On Appeal from the Supreme Court
of the State of Alabama

JOINT MOTION OF APPELLEES ALABAMA PUBLIC SERVICE COMMISSION AND ALABAMA POWER COMPANY TO DISMISS APPEAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

OPINIONS BELOW 2

JURISDICTION 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT 8

A. The Alabama Supersedeas Statutes Were Never Drawn in Question 9

B. The Federal Challenge to the Statutes Was Neither Properly or Timely Raised, Nor Passed upon by the Court Below 12

C. The Decision Below Rests on Adequate and Independent State Law Grounds 14

D. This Appeal Does Not Present a Substantial Federal Question 16

CONCLUSION 21

TABLE OF AUTHORITIES

CASES: *Page*

Airco, Inc. v. Alabama Public Service Commission, 360 So. 2d 970 (Ala. 1978) 7, 8, 9, 13, 14

Alabama Gas Corp. v. Wallace, 293 Ala. 594, 308 So. 2d 674 (1975) 9, 15

Alabama Power Co. v. Alabama Public Service Commission, 390 So. 2d 1017 (Ala. 1980) 2

Arizona Grocery Co. v. Atchinson Topeka & Santa Fe Railway Co., 284 U.S. 370 (1932) 15

Boddie v. Connecticut, 401 U.S. 371 (1971) 17, 18

Brewer v. General Telephone Co., 283 Ala. 465, 218 So. 2d 276 (1969) 10

Cardinale v. Louisiana, 394 U.S. 437 (1969) 11

City of Birmingham v. Southern Bell Telephone & Telegraph Co., 234 Ala. 526, 176 So. 301 (1937) 8, 15, 17

Crowell v. Randell, 35 U.S. (10 Pet.) 367 (1836) 11

Foshee v. General Telephone Co. of the Southeast, 295 Ala. 70, 322 So. 2d 715 (1975) 8, 9, 14, 15

Fuller v. Oregon, 417 U.S. 40 (1974) 12

Georgia Power Co. v. Allied Chemical Corp., 233 Ga. 558, 212 S.E.2d 628 (1975) 17

Georgia Power Project v. Georgia Power Co., 409 F. Supp. 332 (N.D. Ga. 1975) 17

Herndon v. Georgia, 295 U.S. 441 (1935) 8, 12, 14

Holt v. Yonce, 370 F. Supp. 374 (D.S.C. 1973), *aff'd*, 415 U.S. 969 (1974) 17

Lindsey v. Normet, 405 U.S. 56 (1972) 18

Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933) 17

Ortwein v. Schwab, 410 U.S. 656 (1973) 8, 17, 18

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 8, 12

TABLE OF AUTHORITIES—Continued

CASES: *Page*

Sellers v. Iowa Power & Light Co., 372 F. Supp. 1169 (S.D. Iowa 1974) 17

State v. Alabama Public Service Commission, 293 Ala. 553, 307 So. 2d 521 (1975) 9, 15

State v. Public Service Commission, 532 S.W.2d 20 (Mo. 1975), *cert. denied sub nom. Jackson County, Missouri v. Public Service Commission*, 429 U.S. 822 (1976) 17, 18

Street v. New York, 394 U.S. 576 (1969) 12

T. R. Miller Mill Co. v. Louisville & Nashville Railroad Co., 207 Ala. 253, 92 So. 797 (1921) 8, 9, 15, 16

United States v. Kras, 409 U.S. 434 (1973) 8, 17

Walker v. Alabama Public Service Commission, 292 Ala. 548, 297 So. 2d 370 (1974) 4

Wallace v. Alabama Power Co., Case No. 78-120B, unreported order issued January 18, 1979 19

Webb v. Webb, 451 U.S. 493 (1981) 7, 11, 12

CONSTITUTIONAL PROVISIONS:

Alabama Constitution of 1901, Art. III, § 43 15
Alabama Constitution of 1901, Art. VI, Amend. No. 328, § 6.02 11

STATUTES:

Alabama Code § 37-1-16 (Supp. 1982) 3
Alabama Code § 37-1-97 (1975) 15
Alabama Code § 37-1-125 (1975) 9, 10
Alabama Code §§ 37-1-126 through 37-1-130 (1975) 9, 10, 20
Alabama Code § 37-1-135 (1975) 20
Alabama Code § 37-1-140 (Supp. 1982) 3, 9, 19
Alabama Code § 37-1-141 (Supp. 1982) 3, 9, 20
28 U.S.C. § 1257 ..... 7, 11, 12
28 U.S.C. § 1342 20

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS: *Page*

Rules of the United States Supreme Court, Rule 16.1 ..... 1, 7, 11, 12
Alabama Rules of Appellate Procedure, Rule 21 11
Alabama Rules of Appellate Procedure, Rule 24 ..... 5, 19

No. 82-1293

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JEREMIAH TEMPLE, et al.,
Appellants,

v.

ALABAMA PUBLIC SERVICE COMMISSION
and ALABAMA POWER COMPANY,
Appellees.

On Appeal from the Supreme Court
of the State of Alabama

JOINT MOTION OF APPELLEES ALABAMA PUBLIC SERVICE COMMISSION AND ALABAMA POWER COMPANY TO DISMISS APPEAL

Appellees, the Alabama Public Service Commission and Alabama Power Company,[1] respectfully move the Court to dismiss the subject appeal from the Supreme Court of the State of Alabama. This joint motion is submitted pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States, and is based upon the following grounds: (i) the challenged

[1]In accordance with Rule 28.1 of this Court, a listing of all parent companies, subsidiaries and affiliates of appellee Alabama Power Company follows: The Southern Company, a registered public utility holding company, is the parent company of and owns all the common stock in Alabama Power Company. Other subsidiaries of The Southern Company are Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Electric International, Inc. Alabama Power Company owns a 50% interest in Southern Electric Generating Company.

state statutes were never drawn in question; (ii) the federal challenge to the state statutes was neither properly or timely raised, nor was it passed upon by the court below; (iii) the decision below rests on adequate and independent state law grounds; and (iv) the appeal does not present a substantial federal question.

OPINIONS BELOW

The references to the orders and opinions of the Supreme Court of Alabama set forth in the Jurisdictional Statement are correct. Shortly before the Jurisdictional Statement was filed, the appellants solicited a certificate from the court stating that the court considered and passed upon the constitutional questions first raised by the appellants on rehearing. By order dated February 17, 1983, the Supreme Court of Alabama declined to issue this certificate. (*See* Appendices A and B hereto).

JURISDICTION

For the reasons set forth in this motion to dismiss, the appellees contest the jurisdictional basis for this appeal.

STATEMENT OF THE CASE

The proceedings which gave rise to the subject appeal involve the final disposition by the Alabama Public Service Commission ("the Commission") of two general rate cases of Alabama Power Company ("the Company"). The first case involved a retail rate filing by the Company in December, 1978 and subsequent appeals of the Commission's order in that proceeding to the Supreme Court of Alabama ("case 1").[2] On appeal, that court found the Commission's order to result in an unconstitutional taking of the Company's property without just compensation.[3] Case 1 was remanded to the Commission for further proceedings consistent with the court's opinion.

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[2]Case 1 was designated APSC Docket No. 17667.

[3]Alabama Power Co. v. Alabama Pub. Serv. Comm'n, 390 So. 2d 1017 (Ala. 1980).

During the pendency of the appeal in case 1, the Company filed another request for an increase in its general retail electric rates ("case 2").[4] The eleven individual appellants herein petitioned to intervene in case 2 before the Commission, and were allowed to participate in that proceeding in their respective individual capacities.[5] On July 28, 1980, the Commission issued an order in case 2, which granted the Company $30.6 million of its requested $122 million increase in rates. The Company appealed this order directly to the Supreme Court of Alabama pursuant to Alabama Code § 37-1-140 (Supp. 1982), and immediately requested a stay of the Commission's order and permission to collect that portion of the denied rate increase under supersedeas bond, as provided in Alabama Code § 37-1-141 (Supp. 1982). On August 13, 1980, the court granted the Company's request and allowed the Company to collect the full amount of the requested rate increase (subject to refund) following the posting of the required bond.

After case 1 had been remanded with instructions to the Commission and while case 2 was pending on appeal, the Commission initiated public discussions with the parties in both cases with the stated objective of resolving these two cases. Following extended public discussions, the amount of increase was generally agreed upon by all of the parties. The appellants tentatively agreed to this settlement amount, but insisted upon the inclusion of a $3.00 monthly customer service charge in

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[4]This proceeding, instituted by a filing in December, 1979, was designated APSC Docket No. 17859.

[5]The fact that these appellants represented only themselves before the Commission and the Supreme Court of Alabama negates their assertion that "approximately 900,000 residential customers of the Company . . . could be effected [sic] by the outcome of this appeal." (Jurisdictional Statement, p. 8). The appellants were not granted any representative status and they do not represent the residential class of customers. Under Alabama law, the Attorney General is charged with the statutory duty of representing the affected customers of the utility in rate cases before the Commission and the courts. Ala. Code § 37-1-16 (Supp. 1982).

the residential rate structure.[6] The appellants stated that they would oppose the settlement in its entirety unless the Commission capitulated on this rate design issue. Thus, they did not join in the setttlement because of the Commission's decision to incorporate a $3.75 customer charge in the settlement rate level.

In order for the Commission to have jurisdiction to enter a final order implementing the settlement of cases 1 and 2, it was necessary for the parties to petition for a remand of case 2 from the Supreme Court of Alabama.[7] Consequently, a joint motion for remand was submitted to the court, which set forth the reason for the requested remand. A copy of the order which the Commission proposed to enter to resolve the two cases was attached to the motion as an appendix. Further, the joint motion contained a specific request that the court discharge the Company's separate supersedeas bonds posted in connection with cases 1 and 2 upon the entry of the appended order by the Commission.

Because the individual appellants herein did not join in the joint motion for remand, the court issued an order soliciting briefs from all non-consenting parties and further ordering a hearing with respect to their respective positions regarding the joint motion. Though not objecting to remand per se, these appellants expressed to the court their dissatisfaction with the Commission's order to be entered upon remand. The court thereafter granted the joint motion, and the Commission immediately entered a final order on March 12, 1981 imple-

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[6]In Alabama, the residential rate has traditionally been made up of two components: (i) the energy or kilowatt-hour charge, and (ii) the customer service charge. The energy charge varies with the amount of electricity used, while the customer service charge is a fixed charge which is billed to each customer monthly regardless of his usage. This latter charge is designed to recover costs which do not vary with usage, such as meter reading and other billing expenses.

[7]Under Alabama law, an appeal of a Commission rate order divests the Commission of jurisdiction to enter further orders respecting the matter on appeal. Walker v. Alabama Pub. Serv. Comm'n, 292 Ala. 548, 297 So. 2d 370 (1974).

menting the settlement rate level, including the $3.75 customer service charge.[8]

By order dated March 20, 1981, the Supreme Court of Alabama discharged the Company's supersedeas bonds posted in connection with cases 1 and 2. This order was in response to the joint motion, wherein such discharge was specifically requested. Significantly, the appellants did not object to either the request for discharge contained in the joint motion, or the court's order granting the same.

On April 14, 1981, the appellants took a direct appeal from the Commission's order as it related to case 2. At no time prior to rehearing did the appellants bring before the court the objections to the supersedeas statutes which now constitute the sole basis for their appeal to this Court. They did not make application for supersedeas as individual customers of the Company, nor did they seek a stay or other extraordinary relief in furtherance of their appeal.[9] Despite their alleged indigent status, they did not file for leave to proceed *in forma pauperis* as provided in Rule 24 of the Alabama Rules of Appellate Procedure. These appellants simply chose to proceed with their appeal without ever requesting any form of extraordinary relief, whether by statute, rule of court, or otherwise.

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[8]The settlement rate level was less than the rate level the Company was then collecting under supersedeas bond. Thus, the Company was required to refund to its customers a portion of the revenues collected during the prior seven months under the supersedeas bond in case 2. The appellants' assertion that the settlement was made "retroactive" mischaracterizes the Commission's settlement order and the purpose of the Alabama supersedeas statutes (Jurisdictional Statement, p. 4).

[9]The Supreme Court of Alabama has *never* construed or interpreted the supersedeas statutes as they apply to individual residential customers, because no such customer has *ever* filed with that court an application for supersedeas seeking to stay the effect of a Commission rate order. Thus, those portions of the appellants' "Statement of the Case" which repeatedly refer to the requirement that they would have had to post a bond of $50 million are based solely on the appellants' *assumed* construction of the statute. In no case has the Supreme Court of Alabama so interpreted the statute in question, and the court was neither requested nor required to interpret the statute during the appeal below.

While the appellants' appeal of case 2 was pending before the Supreme Court of Alabama, the Company filed completely new rate schedules with the Commission. The purpose of this filing was to implement a new energy cost recovery clause, which clause was the product of a separate complaint proceeding initiated by the Commission.[10] The rates incorporating this new clause were approved by Commission order dated June 22, 1981. Thereafter, the Supreme Court of Alabama ruled, in response to a motion filed by the appellees, that the appellants' appeal in case 2 was moot because of the subsequent action of the Commission establishing new rate schedules. This ruling by the court was made after all parties to that appeal had fully briefed the issues raised in that appeal including, but not limited to, the question of mootness.[11]

Following the court's dismissal of their appeal in case 2, the appellants filed with the court an application for rehearing, together with a brief in support thereof. In this application, the appellants attempted to raise *for the first time* the constitutional questions which are the basis for their appeal to this Court. The Supreme Court of Alabama denied rehearing in a *per curiam* order dated November 5, 1982, with all Justices concurring. No written opinion was issued by the court (Jurisdictional Statement, Appendix B).

On January 24, 1983, the appellants requested the Supreme Court of Alabama to issue a certificate stating that the court had considered and passed upon the constitutional issues first raised on rehearing by the appellants. In their transmittal letter to the court, the appellants recognized that "the question will most certainly be raised whether the [Supreme Court of Alabama] considered and passed upon the constitutional ques-

[10]Alice Elmore, one of the eleven individual appellants here, intervened in that Commission complaint proceeding and was represented there by the same counsel who represented these appellants before the Supreme Court of Alabama, and who represents the appellants before this Court. No appeal was taken from the Commission's order in that complaint proceeding establishing the new energy cost recovery procedure.

[11]The appellants do not challenge this determination of mootness by the Supreme Court of Alabama. (Jurisdictional Statement, p. 7).

tions raised by Appellants in their Application for Rehearing." This letter dated January 24, 1983 to the Supreme Court of Alabama is attached hereto as Appendix A. By order dated February 17, 1983, the court declined to issue the requested certificate, stating:

> The appellant having filed in this Court a request for certification from the Supreme Court of Alabama that certain issues were expressely considered and passed upon in the overruling of the application for rehearing by this Court, without opinion, on November 5, 1982, and the response thereto, having been submitted and duly examined and understood by the Court, it is considered that the request for certification be, and the same is hereby, denied.

This February 17, 1983 order of the Supreme Court of Alabama is attached hereto as Appendix B.

SUMMARY OF ARGUMENT

A. The Alabama supersedeas statutes challenged by the appellants were never drawn in question before the Supreme Court of Alabama. Because the appellants did not invoke these statutes, the court below had neither an opportunity nor an occasion to interpret them. Thus, this appeal fails to satisfy the statutory jurisdictional requirement that a federal challenge to a state statute must be presented first to the state court. 28 U.S.C. § 1257; *Webb v. Webb*, 451 U.S. 493 (1981); Supreme Court Rule 16.1 (a).

B. The appellants first attempted to raise their federal challenge to the state statutes in an application for rehearing following a decision by the Supreme Court of Alabama dismissing the appeal below as moot. That ruling was in conformity with earlier decisions by the court under virtually identical fact situations. *Airco, Inc. v. Alabama Public Service Commission*, 360 So. 2d 970 (Ala. 1978). The appellants were bound to anticipate such a similar ruling in their appeal, and consequently, their federal question was neither properly nor timely raised. As a result, the Supreme Court of Alabama

neither considered nor passed upon the federal question. Under prior decisions of the Court, this appeal is due to be dismissed for failure to raise properly the federal challenge. *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120 (1945); *Herndon v. Georgia,* 295 U.S. 441 (1935).

C. The decision of the Supreme Court of Alabama rests on adequate and independent state law grounds. In a long line of cases, the court has interpreted the Alabama statutory scheme of utility rate regulation as not allowing reparations in connection with Commission orders on appeal. This state law principle was the basis for the dismissal of the appeal below. The court did not rule adversely to the appellants' federal question, because no such federal question was before the Supreme Court of Alabama when it held the case was moot. *Airco, Inc. v. Alabama Public Service Commission,* 360 So. 2d 970 (Ala. 1978); *Foshee v. General Telephone Co. of the Southeast,* 295 Ala. 70, 322 So. 2d 715 (1975); *T. R. Miller Mill Co. v. Louisville & Nashville Railroad Co.,* 207 Ala. 253, 92 So. 797 (1921).

D. No substantial federal questions are presented in this appeal challenging the Alabama supersedeas statutes. The cases relied upon by the appellants in support of their due process and equal protection claims are not applicable. These decisions are particularly inapplicable in the context of utility rate regulation, which is a function of the state legislature and a creature of state statute. *Ortwein v. Schwab,* 410 U.S. 656 (1973); *United States v. Kras,* 409 U.S. 434 (1973); *City of Birmingham v. Southern Bell Telephone & Telegraph Co.,* 234 Ala. 526, 176 So. 301 (1937).

ARGUMENT

Before presenting the grounds supporting this motion to dismiss, it is appropriate to discuss the substance and legal basis of the decision on the merits below by the Supreme Court of Alabama. The court held that the appeal was moot because: (i) during the pendency of the appeal, the Commission estab-

lished a new schedule of retail electric rates pursuant to an unrelated complaint proceeding, which schedule replaced the rates challenged by the appellants, and (ii) absent a stay or supersedeas, rates established by the legislative body are the only lawful rates and no refunds to customers or retroactive collections by the utility are permitted, even if the rates are later judicially disapproved on appeal. Contrary to the assertions of the appellants, the Supreme Court of Alabama did *not* rule that the posting of a supersedeas bond is a "precondition to restitution," for it has long been the rule in Alabama that common law principles of restitution are not applicable to legislative rate matters. *Airco, Inc. v. Alabama Public Service Commission*, 360 So. 2d 970 (Ala. 1978); *Foshee v. General Telephone Co. of the Southeast*, 295 Ala. 70, 322 So. 2d 715 (1975); *Alabama Gas Corp. v. Wallace*, 293 Ala. 594, 308 So. 2d 674 (1975); *State v. Alabama Public Service Commission*, 293 Ala. 553, 307 So. 2d 521 (1975); *T. R. Miller Mill Co. v. Louisville & Nashville Railroad Co.*, 207 Ala. 253, 92 So. 797 (1921).

A. The Alabama Supersedeas Statutes Were Never Drawn in Question

The appellants' constitutional challenge is directed against certain Alabama statutes, which provide for appeals from and a stay or supersedeas of rate orders of the Commission.[12] Although the appellants did perfect an appeal directly to the Supreme Court of Alabama pursuant to Alabama Code § 37-1-140 (Supp. 1982), they *never* attempted to stay or supersede the Commission's order under the procedures set forth in the challenged statutes, or by any other means. Because the challenged statutes were never "drawn in question" before the court below, this appeal suffers from a fundamental and fatal jurisdictional defect.

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[12]The statutes, which are referred to herein as the "Alabama supersedeas statutes," are set forth as Appendix E to the appellants' Jurisdictional Statement. Ala. Code §§ 37-1-125 through 37-1-130; 37-1-140 through 37-1-141 (1975 & Supp. 1982).

No individual residential customer of a utility, including the appellants herein, has ever invoked the Alabama supersedeas statutes in conjunction with the direct appeal of a Commission rate order. Consequently, the Supreme Court of Alabama has never had an occasion or an opportunity to interpret these statutes as they might apply to such an individual customer. The appellants cannot now mount a constitutional challenge to a statutory scheme which was never applied to them, adversely or otherwise.

In prior appeals before the Supreme Court of Alabama, various utilities have invoked the Alabama supersedeas statutes, and a substantial body of case law has evolved as the court has had an opportunity to interpret those statutes as they apply to utility companies. The mere act of filing an application for supersedeas by a utility does not automatically stay the Commission's rate order. Rather, the court has held that the granting of supersedeas is not a ministerial act, but requires the exercise of sound judicial discretion based on a factual showing by the utility that the Commission's order probably results in an unconstitutional taking of the utility's property without just compensation. *See, e.g., Brewer v. General Telephone Co.*, 283 Ala. 465, 218 So. 2d 276 (1969). In all such cases where the court has determined that supersedeas is appropriate, the utilities have been required to post the statutorily prescribed bond.

The Alabama supersedeas statutes provide that a "utility, interested party or intervenor may supersede [a Commission rate order] by giving such supersedeas bond or bonds as may be appropriate." Ala. Code § 37-1-125 (1975). The subsequent sections of the statute specify that the "appropriate bond" for an appealing *utility* is double the estimated amount by which revenues will be increased during the next six months. Ala. Code §§ 37-1-126 through 37-1-130 (1975). The question of what constitutes an "appropriate bond" for an individual residential customer has never been considered by the Supreme Court of Alabama. Similarly, the factual showing necessary to obtain a stay or supersedeas under the challenged statutes and

the general standards governing the court's consideration of that showing are unknown. The appellants' "factual" assertion that a $50 million bond would have been required is nothing more than pure conjecture on their part. The Supreme Court of Alabama was never called upon to make that determination.[13]

In addition to the appellants' failure to draw in question the challenged statutes, they did not pursue other possible avenues of protection. The appellants did not oppose the discharge of the Company's supersedeas bonds, which bonds were already in place as a result of the Company's prior appeals. These bonds were discharged *after* the Commission had entered the settlement order from which the appellants appealed. Under appropriate circumstances, the court *might* have required the Company to maintain an appropriate bond to protect the appellants during the pendency of their appeal. Further, the appellants did not attempt to invoke the court's inherent power to issue remedial and extraordinary writs. *See* Ala. Const. of 1901, Art. VI, Amend. No. 328, § 6.02; Alabama Rules of Appellate Procedure, Rule 21.

In order for the Court to take jurisdiction of this appeal, the Alabama supersedeas statutes must have been "drawn in question" by the appellants. 28 U.S.C. § 1257; *Crowell v. Randell*, 35 U.S. (10 Pet.) 367, 390-97 (1836). This was not done. The powerful policy considerations underlying this statutory requirement (as incorporated in Rule 16 of the Court) have often been articulated by this Court, and do not require repetition. *See, e.g., Webb v. Webb*, 451 U.S. 493, 498-501 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969).

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[13]The appellants at one point were willing to agree to the settlement rate level if a $3.00 monthly customer service charge was incorporated in the residential rate design (instead of the $3.75 charge ultimately approved by the Commission). If this was their principal objection to the Commission's order, an "appropriate bond" for each of these eleven customers *might* have been as little as 75 cents per month. Even assuming these appellants would have had to post a bond in double this amount for six months, that bond would have been $9.00 per individual. Under this interpretation, the total bond for all eleven appellants would have been less than half the docketing fee of this appeal.

The entire basis of the appellants' challenge to the statutes is their own assumed interpretation of these statutes. In order to consider this appeal on the merits, this Court would necessarily be required to interpret state statutes which have never been properly drawn in question by the appellants or interpreted by the Supreme Court of Alabama. Under both 28 U.S.C. § 1257 and Rule 16.1 (a) of the Court, this appeal is due to be dismissed.

B. The Federal Challenge to the Statutes Was Neither Properly or Timely Raised, Nor Passed upon by the Court Below

The appellants concede that the Alabama supersedeas statutes were not alleged to be unconstitutional until *after* their appeal had been adjudged moot and consequently dismissed by the court below. The first reference to the statutes now challenged in this appeal appeared in the appellants' application for rehearing. (Jurisdictional Statement, pp. 2, 6-7; Appendix D, p. 11a). That application for rehearing was denied by the Supreme Court of Alabama without opinion. (Jurisdictional Statement, p. 7; Appendix B).

It is the rule of this Court that federal questions which are raised for the first time on rehearing are *untimely* unless the court below entertains the petition and expressly decides the question. *See, e.g., Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120 (1945); *Herndon v. Georgia,* 295 U.S. 441 (1935). Indeed, this Court assumes that a federal question was not properly presented when the state court does not pass upon the question, unless the aggrieved party in this Court can affirmatively show to the contrary. *Webb v. Webb,* 451 U.S. 493, 495-96 (1981); *Fuller v. Oregon,* 417 U.S. 40, 50 n.11 (1974), *citing Street v. New York,* 394 U.S. 576, 582 (1969).

There can be no doubt that the Supreme Court of Alabama did not pass on any federal question when it denied the appellants' rehearing request. In recognition of this defect in their appeal, the appellants later requested the Supreme Court of Alabama to issue a certificate stating that the federal ques-

tion presented in their application for rehearing was in fact entertained and adversely ruled upon by the court (Appendix A).[14] In response to this request, the court issued an order expressing its understanding of the purpose of the certificate, and specifically declining to issue said certificate (Appendix B). Thus, the federal question untimely raised by these appellants was not passed upon by the highest state court in Alabama, and this appeal is due to be dismissed.

Although certain limited exceptions to the above-stated rule regarding timeliness have evolved, none of these exceptions govern this appeal. The appellants apparently seek to fall within one such exception by vaguely implying that the dismissal of their appeal below was the result of an unexpected statutory interpretation by the court. Thus, the appellants might claim that they had no reason to anticipate or opportunity to assert the federal question before filing their application for rehearing. Any such assertion is unavailing because: (i) the Supreme Court of Alabama made no interpretation of the supersedeas statutes whatsoever, insofar as these statutes were never invoked, and (ii) the dismissal for mootness was in conformity with prior decisions of that court.

In a prior case involving facts virtually identical to those at hand, the Supreme Court of Alabama dismissed an appeal as moot because the rate schedules at issue were supplanted by new rates approved by the Commission and no supersedeas bond had been posted in conjunction with the appeal. *Airco, Inc. v. Alabama Public Service Commission*, 360 So. 2d 970 (Ala. 1978); *see also* cases cited therein.[15] This Court has held

[14]The untimeliness and improper presentation of the federal question in this appeal is also revealed when the purpose of the challenged statutes is considered. By definition, the Alabama supersedeas statutes are designed to stay, under appropriate circumstances, the effect of the Commission order during the pendency of an appeal of that order. These statutes cannot be timely invoked or properly challenged in a rehearing petition filed *after* the appeal (during which the stay would have been effective) has been dismissed as moot.

[15]In *Airco*, certain industrial customers of the Company appealed from an order of the Commission granting an interim rate increase. During the pendency of that appeal, the interim rates were replaced by another set

that an appellant is presumed to know of relevant prior court rulings, and is bound to anticipate a similar ruling in his own case. *Herndon v. Georgia*, 295 U.S. 441, 446 (1935). Thus, an appellant must take appropriate and timely action before the state court in order to preserve his right to review before the Supreme Court of the United States. Under the rule in *Herndon*, these appellants cannot plead ignorance of the prior ruling of the Supreme Court of Alabama in *Airco*.[16]

This Court's prior rulings regarding the untimeliness of federal questions first raised on rehearing are dispositive of the instant appeal. Consequently, this appeal is due to be dismissed because the federal question was not properly or seasonably presented below.

C. The Decision Below Rests on Adequate and Independent State Law Grounds

Under Alabama law, there can be no refunds or back collections as a result of an appeal from a Commission rate order, even if that rate is judicially disapproved at a later time as being either excessive or inadequate. There is no common law or equitable remedy for the recovery of charges prescribed by an order of the Commission.[17] *Airco, Inc. v. Alabama Public Service Commission*, 360 So. 2d 970 (Ala. 1978); *Foshee v.*

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of rate schedules. The court dismissed the appeal as moot, holding that, because there was no supersedeas bond posted, the charges collected during the pendency of that appeal were collected under the only lawful rate established by the Commission. Consequently, no refunds could be ordered and there was no effective remedy which could be granted if the appeal was allowed to continue. Insofar as the court will not issue purely advisory opinions, the appeal there was, as here, dismissed.

[16]The *Airco* decision was cited in support of the appellees' motion to dismiss the appeal below, and was recognized in a responsive pleading by the appellants as correctly setting forth the law of Alabama regarding the unavailability of reparations in the context of appeals from orders of the Commission.

[17]The appellants' repeated references to "basic hornbook law," the common law roots of restitution, and "other civil appellants" are irrelevant in view of the fact that regulation of utilities is in derogation of the common law, and the rights and procedures thereunder are solely creatures of state statute.

General Telephone Co. of the Southeast, 295 Ala. 70, 322 So. 2d 715 (1975); *Alabama Gas Corp. v. Wallace*, 293 Ala. 594, 308 So. 2d 674 (1975); *State v. Alabama Public Service Commission*, 293 Ala. 553, 307 So. 2d 521 (1975); *T. R. Miller Mill Co. v. Louisville & Nashville Railroad Co.*, 207 Ala. 253, 92 So. 797 (1921). This fundamental state law principle is grounded in the Alabama statutory scheme of regulation and the separation of powers doctrine embodied in the state constitution, together with other compelling public policy considerations regarding the need for rate stability.[18]

In Alabama, as elsewhere, ratemaking is solely a function of the legislative branch of the state government. *City of Birmingham v. Southern Bell Telephone & Telegraph Co.*, 234 Ala. 526, 176 So. 301 (1937). Consequently, the only lawful rates which can be charged by the utility are those established by the Commission pursuant to the delegated power of the legislature (the "single rate doctrine"). Ala. Code § 37-1-97 (1975). If the judiciary attempted to order refunds or permit retroactive collections without having first stayed or superseded the rate prescribed by the Commission, the judiciary would, in effect, be setting rates for that prior period, in violation of the state constitution.[19] Ala. Const. of 1901, Art. III, § 43. Further, such action by the court would be "utterly subversive of the policy and utility of any system of rate regulation," because "no rate could be relied upon as stable." *T. R. Miller Mill Co.*

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[18]The appellants are wrong in their claim that the rule in Alabama regarding the unavailability of reparations "is premised on an apparent misconstruction of precedent emanating from this Court . . .". (Jurisdictional Statement, pp. 21-23). The rule in Alabama is *not* based on the Court's decision in Arizona Grocery Co. v. Atchinson Topeka & Santa Fe Ry. Co., 284 U.S. 370 (1932). Rather, this rule is based upon state statutes and regulatory policy interpreted by the Supreme Court of Alabama in T. R. Miller Mill Co. v. Louisville & Nashville R.R. Co., 207 Ala. 253, 92 So. 797 (1921) – a decision which predates *Arizona Grocery*.

[19]The principal role of the court is to determine whether the Commission has performed its ratemaking function within statutory and constitutional bounds. City of Birmingham v. Southern Bell Tel. & Tel. Co., 234 Ala. 526, 176 So. 301 (1937).

v. Louisville & Nashville Railroad Co., 207 Ala. 253, 258, 92 So. 797, 802 (1921).

At the time the Supreme Court of Alabama ruled that the appellants' appeal below was moot and due to be dismissed there was no statutory supersedeas bond in place, nor had any request for supersedeas or other stay been presented to the court. In accordance with the above-stated principles and following the submission of briefs by all parties, the court determined that no effective relief could be granted and thus dismissed the appeal. Most certainly, the Supreme Court of Alabama did *not* rule adversely to the federal question now presented to this Court, because that constitutional issue was not even before the state court at the time it ruled on the merits of the appeal. The court's ruling below was based upon the application of the single rate doctrine described above to the facts and issues before the court at that time — an adequate and independent state law ground.

D. This Appeal Does Not Present a Substantial Federal Question

Although the appellants attempt to raise a constitutional challenge to the Alabama supersedeas statutes without ever drawing those statutes in question, it is apparent from the Jurisdictional Statement that they do not desire to come within the ambit of those statutes. These appellants do not want the ability, upon a proper showing, to obtain a stay or supersedeas during the pendency of an appeal; they want this Court to upset the established Alabama statutory scheme and related case law under which the single rate doctrine evolved. In short, the appellants seek a direction from this Court that a requirement of "restitution" be grafted onto existing state law as it relates to utility rate appeals.[20] Rather than presenting a sub-

[20]Even if the appellants were successful in maintaining this appeal and this Court declared the Alabama supersedeas statutes to be unconstitutional, it does not follow that the appellants would be entitled to reparations in their appeal. (Jurisdictional Statement, p. 7). The Alabama single rate doctrine would remain as a bar to reparations for these appellants.

stantial federal question, the appellants seek a ruling from this Court on a matter which is totally governed by state law.

The appellants' alleged due process claim is predicated on this Court's ruling in *Boddie v. Connecticut*, 401 U.S. 371 (1971), where the Court held that a state statute requiring the payment of various fees in order to obtain a divorce was unconstitutional as applied to indigent persons.[21] In so doing, however, the Court emphasized the importance of the marriage relationship in our society, and characterized that relationship as "fundamental" within the ambit of First Amendment protections. 401 U.S. at 382-83. This important feature has been reiterated in several subsequent decisions of this Court, where the reasoning in *Boddie* was distinguished and held inapplicable to purely economic or social interests. *See Ortwein v. Schwab*, 410 U.S. 656, 658-59 (1973) (welfare benefits); *United States v. Kras*, 409 U.S. 434, 444 (1973) (discharge in bankruptcy).

Individual consumers have no interest involved in the area of utility rate regulation which rises to the level of the marriage relationship found by the Court in *Boddie* to be "fundamental." In Alabama, as elsewhere, customers of a utility have no property right in any given level of utility rates. *City of Birmingham v. Southern Bell Telephone & Telegraph Co.*, 234 Ala. 526, 530, 176 So. 301, 303 (1937). *See, e.g., Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 318 (1933); *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975); *Sellers v. Iowa Power & Light Co.*, 372 F. Supp. 1169 (S.D. Iowa 1974); *Holt v. Yonce*, 370 F. Supp. 374 (D.S.C. 1973), *aff'd*, 415 U.S. 969 (1974); *Georgia Power Co. v. Allied Chemical Corp.*, 233 Ga. 558, 212 S.E.2d 628, 630-32 (1975); *State v. Public Service Commission*, 532

[21] In *Boddie*, the Court observed that there was no dispute as to the indigent status of the appellants therein because this fact was established through affidavits in the record. In this appeal, however, the record below does not contain similar affidavits or other evidence. Indeed, these appellants have made no attempt to proceed *in forma pauperis* either in the proceedings below or here. *Compare* Ortwein v. Schwab, 410 U.S. 656, 658 (1973).

S.W.2d 20, 31-32 (Mo. 1975), *cert. denied sub nom. Jackson County, Missouri v. Public Service Commission*, 429 U.S. 822 (1976). Insofar as no such property rights exist with respect to appeals by individual customers from rate orders of the Commission, the Alabama supersedeas statutes do not offend the appellants' rights of due process. Further, as was noted by this Court in *Ortwein v. Schwab*, 410 U.S. 656, 659-60 (1973), the appellants received a full agency hearing before the Commission (their elected representatives), which hearing was not conditioned on the payment of any fee or the posting of any bond.

Although the appellants attempt to bolster their due process argument by raising the spectre that an "unreasonable rate might very well lead to a termination of utility service," there is no logical connection between this assertion (made without any evidentiary support below) and the appeal herein. (Jurisdictional Statement, pp. 18-19). The appellants never sought a stay of the Commission's order below, and they now expressly disclaim any "desire to stay the effect of the [Commission's] judgment" during the pendency of an appeal. (Jurisdictional Statement, p. 12). Yet, a stay (and *not* "restitution") would be the only effective means whereby the appellants would be protected from any alleged termination resulting from the order on appeal. These inapposite assertions and requests by the appellants undermine their claim that a fundamental right similar to that found in *Boddie* is involved here.

The appellants' equal protection claims are grounded on this Court's decision in *Lindsey v. Normet*, 405 U.S. 56 (1972), where an Oregon "double bond" appeal statute was found to be violative of the Equal Protection Clause of the Fourteenth Amendment. The Oregon statute reviewed in *Lindsey* is readily distinguishable from the Alabama supersedeas statutes and thus the appellants' reliance upon the reasoning in *Lindsey* is misplaced. In that case, the Court noted the following crucial facts: (i) the filing of the double bond was a *precondition* to the taking of an appeal; (ii) the double bond was required *in addition to* the general civil appeal bond; (iii) both the

double bond and the general civil appeal bond were based upon the rental value of the property from which the appellant had been evicted; (iv) the double bond was *forfeited* to the landlord if the judgment was affirmed on appeal, without regard to actual damages; and (v) under an unrelated statute, the landlord could bring a separate action at law for payment of the back rent.

Under the challenged Alabama supersedeas statutes and the general law of the state, *none* of the above-cited factors are present.[22] A direct appeal to the Supreme Court of Alabama may be taken from a rate order of the Commission without the posting of any supersedeas bond. Ala. Code § 37-1-140 (Supp. 1982). If such an appellant prevails on the merits of his appeal, he will reap the benefits of that success prospectively.[23] The only bond required to prosecute an appeal in Alabama is one which covers court costs, and even this bond is waived for appeals maintained *in forma pauperis*. Alabama Rules of Appellate Procedure, Rule 24. Unlike the Oregon statute, which reflected the *known* rental value of the property in dispute, the Alabama supersedeas statutes are based upon *estimated*

[22]Insofar as no individual residential customer, indigent or otherwise, has ever attempted to obtain supersedeas under this statutory scheme, it is unknown whether and under what circumstances this "doubling" aspect of the statutes would be applied. Further, assuming this "doubling" aspect would apply, it is unknown what would be doubled, *i.e.*, the entire rate order, the order as it relates to the residential class, or the rate order as it relates to the individual applicant for supersedeas. The appellants herein assume the answers to these and other such questions as to how these statutes would be applied in this as yet hypothetical situation.

[23]Generally, reparations cannot be granted under Alabama law because of the single rate doctrine, which presumes that an order of the Commission, though later judicially disapproved, was nevertheless the single lawful rate in effect during the pendency of the appeal (absent a stay of the order). If on appeal the court determines that the order was void *ab initio*, that order was not "lawful", and consequently, charges collected thereunder may have to be returned. Wallace v. Alabama Power Co., Case No. 78-120B, unreported order issued January 18, 1979. Although the appellants contended, among other things, that the Commission's order was void because it was the product of a settlement, the Supreme Court of Alabama implicitly rejected this contention when the appeal below was determined to be moot.

future electrical consumption for a six month period. Ala. Code §§ 37-1-127, 37-1-128 (1975). By definition, this estimating process cannot precisely anticipate and incorporate all of the many variables which could significantly affect electrical usage, such as weather, load growth and economic conditions. In short, unlike future rent, future electrical consumption cannot be predicted with mathematical precision.[24] Further, the supersedeas statutes require that the bond, if allowed, be conditioned to pay other damages above and beyond the amounts collected subject to refund, plus interest. Ala. Code §§ 37-1-128, 37-1-141 (1975 & Supp. 1982). If the Commission's order on appeal is affirmed, the supersedeas bond is not forfeited, but stands only to ensure that any actual damages occasioned by the stay are compensated. Finally, the amount of the supersedeas bond must be adequate to cover all such damages, because in Alabama no separate action at law can be maintained other than one to enforce the bond. Ala. Code § 37-1-135 (1975).

Utility rate regulation is a matter that is uniquely within the realm of state law.[25] The federal questions raised by the appellants, if any, are so unsubstantial that an excursion by this Court into this area of state law is neither necessary nor warranted.

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[24]If the Supreme Court of Alabama were presented with a request for supersedeas by an individual residential customer and interpreted the supersedeas statute as allowing that customer to stay the Commission order as to his bill only, the uncertainty of this estimating feature of the statutory scheme would be increased dramatically. This is because an individual has total control over his own level of electric consumption.

[25]This principle has been recognized by Congress, as evidenced in the passage of the Johnson Act. 28 U.S.C. § 1342. That Act severely restricts the power of federal district courts to enjoin, suspend or restrain state commission rate orders.

CONCLUSION

For the foregoing reasons, the motion to dismiss should be granted.

Respectfully submitted,

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Dated: March 24, 1983

APPENDIX A

LEGAL SERVICES CORPORATION OF ALABAMA
Montgomery Regional Office

January 24, 1983

Chief Justice and Associate Justices
of the Supreme Court of Alabama
Judicial Building
Post Office Box 157
Montgomery, Alabama 36101

RE: *Jeremiah Temple, et al., v. Alabama Public Service Commission, et al.*, S.C. No. 80-462

Dear Mr. Chief Justice and Associate Justices:

On November 5, 1982, this Court overruled Appellants' Application for Rehearing in the above-styled cause and dismissed their appeal as being moot, *per curiam*, and without written opinion. On Application for Rehearing, Appellants had raised serious constitutional challenge to certain provisions of the Alabama Code governing appeals in utility rate cases, *viz*, those sections of the Code which, as applied, require the posting of a stay or supersedeas bond as a precondition to restitution in appeals from utility rate cases, Sections 37-1-141 and 37-1-125 through 37-1-130 of the Code of Alabama (1975).

Appellants are considering an appeal to the Supreme Court of the United States from this Court's order dated November 5, 1982; however, since this Court did not issue any written opinion on rehearing, the question will most certainly be raised whether the Court considered and passed upon the constitutional questions raised by Appellants in their Application for Rehearing — even though it must be assumed that the Court did so, as it took the Court well over a year to rule on Appellants' application.

Since the costs involved in taking an appeal to the Supreme Court are substantial, Appellants are desirous of obtaining

from this Court, in advance of the taking of their appeal, certification of the fact that the Court did consider and pass upon the constitutional issues raised by these Appellants on rehearing, and did determine the questions adversely to the Appellants. For the convenience of the Court, I have prepared a certificate which so states and pray the Court to execute same at its earliest possible convenience.

Sincerely,

/s/ ROBERT J. VARLEY

Attorney for Appellants

cc: All parties of record

APPENDIX B

February 17, 1983

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1982-83

80-462

JEREMIAH TEMPLE, et al.

v. APSC DOCKET NO. 17667

THE ALABAMA PUBLIC
SERVICE COMMISSION

ORDER

The appellant having filed in this Court a request for certification from the Supreme Court of Alabama that certain issues were expressly considered and passed upon in the overruling of the application for rehearing by this Court, without opinion, on November 5, 1982, and the response thereto, having been submitted and duly examined and understood by the Court, it is considered that the request for certification be, and the same is hereby, denied.

Torbert, C. J., and Maddox, Jones, Almon, Shores, Embry, Beatty, and Adams, JJ., concur.

Faulkner, J., not sitting.

I, Dorothy F. Norwood, as Acting Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 18th day of Feb., 1983

/s/ DOROTHY F. NORWOOD
Acting Clerk, Supreme Court of Alabama